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No. 96-

In The

Supreme Court of the United States

October Term, 1996

STATE OF KANSAS,

Petitioner,

vs.

KYM MYERS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After this Court's decisions in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 509 U.S. 602 (1993), *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995) and *United States v. Ursery*, 116 S.Ct. 2135 (1996), what is the test to be used in determining what constitutes punishment for the purposes of *ex post facto* analysis?

2. Does the Kansas Sex Offender Registration Act, Kan.Stat.Ann 22-4901, *et seq.* (1995), which allows members of the general public to access registrant information upon request, violate the Ex Post Facto Clause of Art. I, § 10 of the United States Constitution?

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OPINIONS BELOW

The August 23, 1996, decision of the Kansas Supreme Court holding that the public access provision of the Kansas Sex Offender Registration Act is punishment in violation of the Ex Post Facto Clause of Art. I, § 10, as applied to any person whose offense occurred before the effective date of the Act, is reported at 260 Kan. 669, 923 P.2d 1024 (1996), and is included as Appendix A.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision on August 23, 1996. This petition was filed within ninety (90) days of that date as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the United States Constitution applicable to the states provides: "No State shall . . . pass any . . . ex post facto Law." U.S. Const. Art. I § 10.

The Kansas Sex Offender Registration Act, Kan.Stat.Ann. 22-4901 *et seq.* (1995), is set forth in full in Appendix B.

STATEMENT OF THE CASE

Procedural History

Respondent was convicted in 1991 of one count of rape, Kan.Stat.Ann. § 21-3502 (1983), and one count of sexual battery, Kan.Stat.Ann. § 21-3517 (1983). The Kansas Court of Appeals reversed and remanded the case due to trial court error. *State v. Myers*, Unpublished Opinion No. 67,626 (Kan.App. 1993); *aff'd, State v. Myers*, 255 Kan. 3, 872 P.2d 236 (1994). Upon remand, the respondent pled no contest to one count of aggravated sexual battery, Kan.Stat.Ann. § 21-3518 (1983), on August 15, 1994.

At the time of the August 15 sentencing, respondent was ordered to register as a sex offender under the Kansas Sex Offender Registration Act, Kan.Stat.Ann. § 22-4901 *et seq.* (1994). Respondent objected to the imposition of the Act, arguing that it was inapplicable to him because his underlying offense occurred prior to its date of enactment. Lyon County District Court Case No. 90-CR-432, Transcript of Sentencing, Appendix C at 54-55a. His objection was noted for the record and was overruled. *Id.* at 55a. Respondent was given credit for time served and was placed on probation.

Approximately four months later, respondent filed a motion to modify the conditions of his probation, arguing again that the Act should not be applied retroactively and that ordering him to register constituted additional punishment in violation of the *Ex Post Facto* Clause of Article I, § 10. Respondent's motion was once again overruled. Lyon County District Court Case No. 90-CR-432, R. II, pp. 77-78, Appendix D.

On September 14, 1995, respondent filed an appeal with the Kansas Court of Appeals alleging that the Kansas Sex Offender Registration Act., Kan.Stat.Ann. § 22-4901 *et seq.* (1994), violated the *Ex Post Facto* Clause of Article I, § 10, the Cruel and Unusual Punishments Clause of the Eighth Amendment and his procedural due process rights under the Fourteenth Amendment. A motion to transfer was granted by the Kansas Supreme Court on November 3, 1995. On August 23, 1996, the Kansas Supreme Court upheld the Act's registration requirement but invalidated on *ex post facto* grounds its public access provision as applied to those persons whose offenses were committed prior to the effective date of the Act. *See* App. A. The Court declined to address the respondent's cruel and unusual punishment and due process claims. *Id.* at 44-46a.

The Kansas Sex Offender Registration Act

The Kansas Sex Offender Registration Act, Kan.Stat.Ann. § 22-4901 *et seq.* (1995), set forth in full in Appendix B, mandates the registration of any person, who after the effective date of the Act, is convicted of a "sexually violent crime." Kan.Stat.Ann. § 22-4902(a) (1995). The term "sexually violent crime" encompasses the following: rape; indecent liberties with a child; aggravated indecent liberties with a child; criminal sodomy; aggravated criminal sodomy; indecent solicitation of a child; aggravated indecent solicitation of a child; sexual exploitation of a child; aggravated sexual battery; any conviction for a felony offense in effect prior to the effective date of the Act that is comparable to a sexually violent crime; any federal or state conviction for a felony

offense that under the laws of the State of Kansas would be a sexually violent crime; an attempt, conspiracy or criminal solicitation of a sexually violent crime; or any act which is determined at sentencing beyond a reasonable doubt to have been "sexually motivated." Kan.Stat.Ann. § 22-4902(b) (1995).

Pursuant to the Act, any person convicted of a sexually violent crime must register with the local sheriff within fifteen (15) days of coming into any county where the offender resides or is temporarily domiciled. Kan.Stat.Ann. § 22-4904 (1995). Registrants must provide the following information: name; date of birth; offense or offenses committed, date of convictions; city or county of conviction or convictions; a photograph; fingerprints; and social security number. Kan.Stat.Ann. § 22-4907 (1995).

The registration term is for a period of ten years upon the offender's first conviction and for life upon a second or subsequent conviction. Kan.Stat.Ann. § 22-4906 (1995). A registrant may apply to the court for an order relieving him/her of the duty to register at any time. If, after a court hearing in which the sex offender is allowed to present witnesses and other evidence, the court finds by a preponderance of the evidence that the sex offender is rehabilitated, he/she is relieved of the duty to register. Kan.Stat.Ann. § 22-4908 (1995).

Information provided pursuant to the Act is open public record and is specifically subject to the provisions of the Kansas Open Records Act, Kan.Stat.Ann. § 45-215

et seq. (1995).[1] Members of the public can access the registrant information, if they choose to do so, by requesting it at their local sheriff's office. Kan.Stat.Ann § 22-4909 (1995). The Act does not require or authorize any public agency or official to engage in any affirmative public disclosure of registrant information.

The Kansas Supreme Court Decision

On August 23, 1996, the Kansas Supreme Court held that the public access provision of the Kansas Sex Offender Registration Act constitutes punishment in violation of the *Ex Post Facto* Clause of Art. I, § 10 of the United States Constitution. *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), App. A. The court ultimately concluded as follows: "To prevent an ex post facto violation, each sheriff's office shall adopt a record system that prevents public access or disclosure of the statements or any other information required by KSORA of any sex offender required to register whose offense occurred before April 14, 1994. Any such statements or other information shall neither be open to the public nor subject to the provisions of the Kansas Open Records Act, Kan.Stat.Ann. 45-215 *et seq.* [1995]" *Id.* at 46-47a.

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[1] The Kansas Sex Offender Registration Act was initially enacted in 1993 and was amended to its present form in 1994. Prior to the amendment, the Act applied only to habitual sex offenders, i.e. those convicted a second or subsequent time of certain enumerated sex offenses. Registrant information was not open to public inspection and was specifically exempt from the provisions of the Kansas Open Records Act, Kan.Stat.Ann. 45-215 *et seq.* (1995).

In reaching its conclusion, the court discussed at length the debate among lower federal and state courts over what test to apply in determining punishment for purposes of *ex post facto* analysis. *Id.* at 17-26a. The court observed that this Court has not developed a standardized test to be employed in considering *ex post facto* challenges to sex offender registration/notification statutes. While many courts have utilized the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the court remarked that several lower federal and state courts have found the *Mendoza-Martinez* factors to be completely inapplicable to *ex post facto* analysis. *See Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1262 (3rd Cir. 1996); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 405 (N.J. 1995).[2] *Id.* at 17-20a. Nonetheless, the Kansas Supreme Court concluded: "*Ursery* [*United States v. Ursery*, 116 S.Ct. 2135 (1996)] has endorsed the *Mendoza-Martinez* factors for consideration in the punitive/non-punitive analysis." *Id.* at 26a.

Using the *Mendoza-Martinez* factors, 372 U.S. at 168-169, the Kansas Supreme Court struck down the public access provision as applied to those registrants who committed their offense before the effective date of the Act. *Id.* at 46-47a. In so doing, the Court placed particular emphasis on three *Mendoza-Martinez* factors: (1) whether the Act imposed an affirmative disability or restraint; (2)

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[2] The issue before the Court in *Mendoza-Martinez* was the constitutionality of a federal statute that provided for the automatic relinquishment of citizenship for draft evaders without due process of law. The *Artway*, 81 F.3d at 1262, and *Doe*, 662 A.2d at 405, courts found the *Mendoza-Martinez* factors to be relevant only within that limited context.

whether the public disclosure provision advanced the goals of retribution and deterrence; and (3) whether the act was excessive in relation to its underlying goals. *Id.* at 37-44a.

The court found that public access to registrant information imposes an affirmative disability on the registrant because "the information could be routinely published in the newspaper or otherwise voluntarily disseminated by anyone." *Id.* at 37-38a. It commented that such dissemination would potentially subject the registrant to public stigma and ostracism and could make it impossible for a registrant to procure housing and/or employment. *Id.* at 38a.

The court then found that the public access provision serves both retributive and deterrent purposes. *Id.* at 38a. In the court's view, "registration has an obvious deterrent effect" in that registrants may not commit an offense if they know that their information is on file with the local sheriff. *Id.* Further, "the stigma that will accompany public exposure of the registered information could be viewed as a form of retribution." *Id.*

The court, however, placed primary emphasis on whether the statute was excessive in relation to its underlying goal. *Id.* at 39-44a. The court had previously noted, at pp. 6a, 26-36a that there is a "trend toward limited public disclosure" in state sex offender registration statutes but that none of the statutes that have survived *ex post facto* challenges have provided for unlimited access to registrant information. *Citing Snyder v. State,* No. 95-174, 912 P.2d 1127 (Wyo. 1996) (only those authorized by law to receive criminal history information are

allowed access); *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (Ariz. 1992) (information provided was available to non-criminal justice agencies for the purpose of evaluating prospective employees; public officials and volunteers; governmental licensing agencies; prospective employers and volunteer youth-service agencies whose activities involved regular conduct with minors; the department of economic security; and the superior court); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995) (tier notification statute categorized level of notification according to risk of recidivism); *Opinion of the Justices to the Senate*, 423 Mass. 1201, 668 N.E.2d 738 (1996) (notification dependent upon risk of recidivism); *State v. Costello*, 138 N.H. 587, 643 A.2d 531 (1994) (registrant information was confidential); *State v. Ward*, 123 Wash.2d 488, 869 P.2d 1062 (Wash. 1994) (information released when necessary to protect the public); *People v. Starnes*, 273 Ill.App.3d 911, 653 N.E.2d 4 (1995) (information kept confidential); *State v. Manning*, No. C7-94-2242, 543 N.W. 2d 244 (Minn.App. 1995) (information limited to law enforcement).

While holding that the legislative aim was not to punish and that retribution was not an intended purpose of the Act, the court reasoned that the repercussions were great enough to be considered punishment. *Id.* at 43a. Without addressing the argument that much of the information required by the Kansas Sex Offender Registration Act is public record, the court held that the unrestricted public access to registrant information was excessive and went beyond what was necessary to promote the public safety. *Id.*

REASONS FOR GRANTING THE WRIT

I. This Case Raises Important, Unresolved Questions Which Have Divided the Lower Federal and State Courts Concerning the Constitutionality of Sex Offender Access And/Or Notification Schemes.

Sex offender notification statutes have become a tool in the nationwide effort to address effectively the public safety concerns created by sex offender recidivism. As states are increasingly exploring this avenue of regulation, they unfortunately lack the necessary guidelines from this Court by which to adjudge the constitutionality of their efforts, particularly as applied to sex offenders whose crimes were committed prior to the enactment of such legislation. Indeed, the lower federal and state courts are divided on what constitutional test to apply and, therefore, on what forms of registration and notification, if any, pass constitutional muster as a valid exercise of the states' regulatory, non-punitive police powers.

Because of the timeliness and importance of this topic and the fact that confusion abounds in this area of the law, this Court should grant plenary review of this case to establish parameters by which lawmakers can evaluate the constitutionality of their respective statutes. At the very least, this Court should hold the petition in this case for resolution following its decision regarding the constitutionality of the Kansas Sexually Violent Predator Act in *State v. Hendricks*, No. 95-1649, and *Hendricks v. State*, No. 95-9075 (to be argued December 10, 1996), the latter of which involves, among other issues, an *ex post facto* challenge to a civil commitment system for certain sex offenders.

A. This Court Should Clarify the Test To Be Utilized In Determining Whether a Regulatory Scheme Imposes Punishment In Violation of Constitutional *Ex Post Facto* Prohibitions.

Lower federal and state courts are in conflict over what factors are to be considered in determining whether an access and/or notification statute constitutes punishment for *ex post facto* purposes. The courts have agreed that if the legislature's subjective intent is to punish the registrant, *ex post facto* concerns are implicated. However, if the legislature's intent is to regulate in the interest of public safety, the lower courts have struggled with the question of whether and, if so, when a law's effect is sufficiently punitive in nature so as to negate the regulatory intent.[3]

In considering this issue, the courts have divided on the test to be employed in determining whether a law's punitive effect negates a proper and otherwise regulatory purpose. The majority of courts have applied some or all of the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963): (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment, retribution and deterrence; (5) whether the behavior

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[3] At least two courts have ended their inquiry upon finding that the legislature's subjective intent was to regulate rather than punish. *See State v. Costello*, 138 N.H. 587, 643 A.2d 531, 533 (N.H. 1994); *People v. Adams*, 144 Ill.2d 381, 581 N.E.2d 637, 641 (Ill. 1991).

to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. See *Doe v. Pataki*, 1996 WL 539830 (S.D.N.Y.); *Roe v. Office of Adult Probation*, 1996 WL 494770 (D. Conn.); *Stearns v. Gregoire*, No. C95-1486 (D. Wash. 1996); *Doe v. Pataki*, 919 F.Supp. 691, 700 (S.D.N.Y. 1996); *Artway v. Attorney General of New Jersey*, 876 F.Supp. 666, 673 (D.N.J. 1995); *Rowe v. Burton*, 884 F.Supp. 1372, 1378 (D. Alaska 1994); *State v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1068 (1994); *State v. Manning*, No. C7-94-2242, 532 N.W. 244, 247 (Minn. App. 1995); *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217, 1221 (1992); *In re Reed*, 191 Cal.Rptr. 658, 663 P.2d 216, 218 (1983).

Others, however, have questioned the relevance of *Mendoza-Martinez* to *ex post facto* analysis. For example, in *Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1262 (3rd Cir. 1996), the Third Circuit stated: "Nevertheless, like the New Jersey Supreme Court in *Doe*,[4] 142 N.J. at 63-73, we think it wise to heed the Supreme Court's advice. *Mendoza-Martinez* is inapplicable outside the context of determining whether a proceeding is sufficiently criminal in nature to warrant criminal procedural protections of the Fifth and Sixth Amendments." Although finding that the public notification issue was not yet ripe for review, the Third Circuit proposed a three prong test to be used for *ex post facto* purposes. Based upon its synthesis of this Court's opinions in *United States v. Halper*, 490 U.S. 435 (1989); *DeVeau v. Braisted*, 363 U.S. 144 (1960); *Austin v. United States*, 509 U.S. 602 (1993); *Department of*

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[4] *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 405 (N.J. 1995).

Revenue v. Kurth Ranch, 511 U.S. 767 (1994) and *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995), the court stated:

> A measure must pass a three prong analysis – (1) actual purpose, (2) objective purpose, and (3) effect – to constitute non-punishment. We must look to actual purpose to see "whether the legislative aim was to punish." *See DeVeau*, 363 U.S. at 160. If the legislature intended Megan's Law to be "punishment," . . . it must fail constitutional scrutiny . . . If the legislature's actual purpose does not appear to be to punish, we next look to its "objective" purpose. This prong, in turn has three subparts. First, can the law be explained solely by a remedial purpose? *See Halper*, 490 U.S. at 448 . . . Second, even if some remedial purpose can solely explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? *See Austin*, 113 S.Ct. at 2806 . . . Third, if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its "usual" manner, consistent with its historically mixed purposes. *See Kurth Ranch*, 114 S.Ct. at 1946-[19]48 . . . Finally, if the purpose tests are satisfied, we must then turn to the effects of the measure. If the negative repercussions – regardless of how they are justified – are great enough, the measure must be considered punishment. *See Morales*,115 S.Ct. at 1603. *Artway*, 81 F.3d at 1263.

While sharing the Third Circuit's belief that *Mendoza-Martinez* is inapplicable to *ex post facto* challenges, the New Jersey Supreme Court in *Doe*, 662 A.2d at 405, found only *Halper*, 490 U.S. at 435, and *Austin*, 509 U.S. at 602, to be relevant:

> We note that the dissent continues the misapplication of *Mendoza-Martinez* despite its clear rejection by the Supreme Court in *Halper* and *Austin*. Those two cases provide the test, used in this opinion, for determining whether the provisions of a statute impose punishment in violation of the additional punishment part of the Ex Post Facto Clause, the multiple punishment part of the Double Jeopardy Clause, the Cruel and Unusual Punishment Clause; and the Excessive Fines and Penalties Clause; and they explicitly reject the *Mendoza-Martinez* test for that purpose . . . 142 N.J. 1, 662 A.2d 367, 405, fn. 17 (Stein, J., dissenting).

In contrast, in *W.P. v. Poritz*, 931 F.Supp. 1199, 1209 (D.N.J. 1996), the court found neither the test enunciated in *Artway*, 81 F.3d at 1235, nor *Doe*, 662 A.2d at 405, to be persuasive due to this Court's holding in *United States v. Ursery*, 116 S.Ct. 2135 (1996):

> The Supreme Court has now stated that *Halper*, *Austin*, *Kurth Ranch*, (by implication *Morales*), and now *Ursery* cannot be employed to establish a "synthesis" that generates a universal framework for defining "punishment" in all cases . . . What *Ursery* teaches us, however, is that such considerations may not be transformed into a rigid series of hurdles which must be surmounted, one after the other, before the legislation can survive an ex post facto or double

> jeopardy challenge. Rather this Court, in an analysis similar to that in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (although the factors considered are not identical), must weigh these considerations in a less structured fashion to reach its decision.

The Kansas Supreme Court, likewise, after examining the foregoing opinions, concluded:

> Although often re-labeled, the *Mendoza-Martinez* factors continue to reappear in some form in ex post facto and double jeopardy analysis. Certain factors are given more weight in the analysis and others totally disregarded, depending on the context. We conclude that *Ursery* has endorsed the *Mendoza-Martinez* factors for consideration in the punitive/nonpunitive analysis. App. A at 26a.

The status quo is one of confusion. The lower courts need guidance in determining what test is to be applied in the *ex post facto* punitive/non-punitive analysis. Even if this Court is of the opinion that the Kansas Supreme Court's resort to the *Mendoza-Martinez* factors, 372 U.S. at 168-169, is proper, the lower courts require guidance from this Court concerning the weight to be given to each component:

> Any of these tests must avoid the evident danger of circularity, defining a penal or regulatory effect or intent in terms of the very concepts to be explained. The *Mendoza-Martinez* factors seek to overcome that danger by identifying independently recognizable criteria for making the critical distinction . . . Without some indication of

> the weight and priority of these factors, however, that test risks an unmanageable indefiniteness. *Opinion of the Justices To the Senate*, 423 Mass. 1201, 668 N.E.2d 738, 749-750 (1996).

The State of Kansas urges the Court to grant this petition for a writ of certiorari to clarify the test to be used in determining what constitutes punishment for purposes of *ex post facto* analysis or, alternatively, to hold this petition for resolution pending this Court's decision in *State v. Hendricks*, No. 95-1649, and *Hendricks v. State*, No 95-9075 (to be argued Dec. 10, 1996).

B. The *Ex Post Facto* Issues Raised are Important and Recurring.

Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, commonly known as the Jacob Wetterling Act, 42 U.S.C. § 14071 (1994), states were given financial incentives to establish registration systems for those convicted of certain crimes against minors and sexually violent offenses. The newly enacted federal Megan's Law, H.R. 2137, Pub.L. 104-145 (May 17, 1996), further conditions receipt of federal funds upon the establishment of state sex offender notification systems.[5] In addition, President Clinton has directed the Federal

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[5] Megan's Law, H.R. 2137, Pub.L. 104-145 (1996) amended the Wetterling Act, 42 U.S.C. § 14071(d), to provide for the release of "relevant information" concerning a person who is required to register under the Wetterling Act when "necessary to protect the public." The United States Department of Justice has not promulgated rules and regulations concerning Megan's Law as of this date.

Bureau of Investigation to develop a nationwide sex offender registration system, which is expected to be in place by 1999.

As state legislatures respond to this newly enacted federal legislation, conscientious state lawmakers must grapple with the question of what types of disclosure/access/notification schemes, if any, are constitutionally permissible. Commentators have generated a number of articles addressing the constitutionality of notification laws. *See, e.g.*, Note, *Prevention versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 Harv. L. Rev. 1711 (1996); Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 New. Eng. L. Rev. 183 (1995); Comment, *Megan's Law: The New Jersey Supreme Court Navigates Unchartered Waters*, 26 Seton Hall L. Rev. 764 (1996); Patricia L. Petrucelli, Comment, *Megan's Law: Branding the Sex Offender or Benefitting the Community*, 5 Seton Hall Const. L.J. 1127 (1995); Simeon Schopf, *Megan's Law: Community Notification and the Constitution*, 29 Colum. J.L. & Soc. Probs. 117 (1995); Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 Calif. L. Rev. 885 (1995); Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 Vand. L. Rev. 219 (1995); Christine M. Kong, Comment, *The Neighbors are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 Vill. L. Rev. 1257 (1995); Tracy L. Silva, Comment, *Dial "1-900-Pervert" and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 S.M.U. L. Rev. 1961 (1995); Jenny A. Montana, Note, *An Ineffective*

Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law, 3 J.L. & Pol'y 569 (1995); Kenneth Crimaldi, Note, *"Megan's Law": Election-Year Politics and Constitutional Rights*, 27 Rutgers L.J. 169 (1995). However, commentators and courts alike are divided on whether sex offender registration/access/disclosure provisions will pass constitutional muster.

1. All Fifty States, As Well As the United States, Have Enacted Sex Offender Registration Statutes And Most Have Also Enacted Access And/Or Notification Statutes.

To date, the United States and all fifty states have enacted sex offender registration statutes. *See* Ala.Code § 13A-11-200 *et seq.* (1994); Alaska Stat. §§ 12.63.010 *et seq.* (Michie 1995), 18.65.087 (Michie 1994); Ariz.Rev.Stat.Ann. § 13-3821 *et seq.* (West 1996); Ark.Code Ann. § 12-12-901 *et seq.* (Michie 1995); Cal.Penal Code § 290 *et seq.* (West Supp. 1996); Colo.Rev.Stat.Ann. § 18-3-412.5 (West Supp. 1996); Conn.Gen.Stat.Ann. § 54-102r (1996); Del.Code Ann. tit. 11 § 4120 (1995); Fla.Stat.Ann. §§ 944.606, 775.21 *et seq.* (West Supp. 1997); Ga.Code Ann. § 42-9-44.1 (Michie 1994); Haw.Rev.Stat. § 707-743 (Michie Supp. 1996); Idaho Code § 18-8301 *et seq.* (Michie 1996); 730 Ill.Comp.Stat. 150/1 *et seq.* (West Supp. 1996); Ind.Code Ann. § 5-2-12-1 *et seq.* (West Supp. 1996); Iowa Code § 692A (1995); Kan.Stat.Ann. § 22-4901 *et seq.* (1994); Ky.Rev.Stat.Ann. § 17.500 *et seq.* (Michie Supp. 1996); La.Rev.Stat.Ann. § 15:540 *et seq.* (West Supp. 1996); Me.Rev.Stat.Ann. tit. 34-A § 11101 *et seq.* (West Supp. 1996); Md.Ann.Code art. 27, § 792 (1996); Mass.Gen.Laws Ann. ch. 6, § 178 *et seq.* (West Supp. 1996); Mich.Stat.Ann. § 4.475(1) *et seq.* (Law. Co.op. Supp. 1996); Minn.Stat.Ann.

§ 243.166 (West 1997); Miss.Code Ann. § 45-33-1 *et seq.* (Law. Co.op. Supp. 1997); Mo.Rev.Stat. § 566.600 *et seq.* (1996); Mont.Code Ann § 46-23-501 *et seq.* (1994); Neb.Rev.Stat. § 29-4001 *et seq.* (R.S. Supp. 1996), *eff.* January 1, 1997; Nev.Rev.Stat. § 207.151 *et seq.* (Michie Supp. 1995); N.H.Rev.Stat.Ann. § 632-A:11 *et seq.* (1996); N.J.Stat.Ann. § 2c:7-2 (West Supp. 1996); N.M.Stat.Ann. § 29-11A-1 *et seq.* (Michie Supp. 1996); N.Y. Correct.Law § 168 (1996); N.C. Gen.Stat. § 14-208.5 *et seq.* (Michie 1996); N.D. Cent.Code § 12.1-32-15 *et seq.* (Butterworth Supp. 1995); Ohio Rev.Code.Ann. § 2950.01 (Baldwin 1995); Okla.Stat.Ann. tit. 57 § 581 *et seq.* (West Supp. 1997); Or.Rev.Stat. § 181.585 (Michie Supp. 1996); Pa.Stat.Ann. tit. 42 § 9793 (West Supp. 1996); R.I.Gen.Laws § 11.37.1-1 *et seq.* (Michie Supp. 1996); S.C. Code Ann. § 23-3-400 *et seq.* (1994); S.D.Codified Laws Ann. § 22-22-30 *et seq.* (Michie Supp. 1996); Tenn.Code Ann. § 40-101 *et seq.* (Michie Supp. 1996); Tex.Rev.Civ.Stat.Ann. art. 6252-13c.1 (West Supp. 1997); Utah Code Ann. § 77-27-21.5 (Michie Supp. 1996); Va.Code Ann. § 19.2-390.1 (Michie Supp. 1996); Wash.Rev.Code Ann. §§ 9A.44.130, 4.24.550 (West Supp. 1997); W.Va.Code § 61-8F-1 *et seq.* (Michie Supp. 1996); Wis.Stat.Ann. § 175.45 (West Supp. 1995); Wyo.Stat. § 7-19-101 *et seq.* (1995).

While registration statutes are, for the most part, similar throughout the states, the states differ greatly on the extent to which members of the public are allowed access to registrant information. A number of states allow registrant information to be distributed to law enforcement officers or agents only. *See* Ala.Code §§ 13A-11-201, 13A-11-202 (1994); Ark.Code Ann. § 12-12-909 (Michie 1995); Ky.Rev.Stat.Ann. § 17.510(11) (Michie Supp. 1996);

Mich.Stat.Ann. § 4.475(10) (Law. Co.op. Supp. 1996); Neb.Rev.Stat. § 29-4009 (R.S. Supp. 1996); N.M.Stat.Ann. § 29-11A-6 (Michie Supp. 1996); Ohio Rev.Code.Ann. § 2950.08 (Baldwin 1995); Pa.Stat.Ann. tit. 42 § 9793 (West Supp. 1996); S.C.Code Ann. § 23-3-490 (1994); S.D. Codified Laws Ann. § 22-22-33 (Michie Supp. 1996); Utah Code Ann. § 77-27-21.5(13) (Michie Supp. 1996); Wis.Stat.Ann. § 175.45(7) (West Supp. 1995); Wyo.Stat. §§ 7-19-303, 7-19-106 (1995).

The others allow for varying degrees of notification. Several states, including Kansas, have what has been described as a "passive" system of notification. Registrant information is either open for public inspection at the registering agency or is available to the public upon request. *See* Cal.Penal Code § 290.4 (West Supp. 1996) (creates a subdirectory of "sexual habitual violators" who are a threat to the public safety; photograph, name, physical description, age and distinctive markings are accessible to the public); Fla.Stat.Ann. § 944.606 (West Supp. 1997) (For those determined to be "sexual predators" under Fla.Stat.Ann. § 775.21 *et seq.*, law enforcement officials must inform the community and the public of the predators presence in the community. This section is applicable to all other sex offenders.); Ga.Code Ann. § 42-9-44.1 (Michie 1994) (registrant's name and address is open to public inspection at the sheriff's office; registration applies only to child sex offenders); Kan.Stat.Ann. § 22-4909 (1994) (registrant information is open to public inspection at the sheriff's office); Idaho Code §§ 18-8301, 9-340(11)(f)(ii) (Michie 1996) (registrant information is available upon written request; requesting party must provide name, date of birth and social security of registrant in order to access the information); 730

Ill.Comp.Stat. 152/120 (West Supp. 1996) (information on child sex offenders whose offense was committed after the effective date of the act is open to public inspection); Mass.Gen.Laws Ann. ch. 6 §§ 178I, 178J (West Supp. 1996) (information available upon written request); Mont.Code Ann. § 46-23-508(1) (1995) (the name of a sex offenders is public record); N.Y.Correct.Law § 168-q (1996) (a subdirectory of "sexually violent predators" is maintained at local village, town or city police departments; the requesting party must "express a purpose in writing" in order to gain access); N.D.Cent.Code § 12.1-32-15(10) ("nonregistration information" including the offender's name, last known address, offense or offenses committed, date of judgment or order, court imposing the judgment or order, sentence imposed and disposition is available to the public); Tex.Rev.Civ.Stat.Ann. art 6252-13c.1 § 5 (West Supp. 1997) (registrant information is public record; the registrant's photograph, social security number, driver's license number, numeric street address or telephone number is confidential).

Three states have established "900" lines that allow members of the public to access registrant information by telephone. *See* Cal.Penal Code § 290.4 (West Supp. 1996) (caller must furnish first, middle and last name and provide six identifying characteristics of the registrant, i.e., birth date, ethnicity, height, etc., in order to gain access to the information); N.Y.Correct.Law § 168-p (1996) (part of a comprehensive package that includes subdirectory access, as noted above, and tier notification); Or.Rev.Stat. § 181.585 (Michie Supp. 1996) (accessible to crime victims only).

Others allow disclosure of registrant information only to certain specified groups and law enforcement

agencies. *See* Del.Code Ann. tit. 11 § 4120(i) (1995) (employers in "sensitive area(s) dealing with children" can access registrant information); 730 Ill.Comp.Stat. 152/125 (West Supp. 1996) (information concerning child sex offenders whose offense or adjudication occurred after the effective date of the act is released to children and family services, school boards and child care facilities); Ind.Code § 5-2-12-11 (West Supp. 1996) (registrant information is provided to school corporations, public schools, state agencies that license individuals who work with children, the state personnel department, child care entities licensed by or registered in the state, and to other agencies that provide services to children (upon request); registrant's home address is not available to those entities falling within the last two categories); Nev.Rev.Stat. § 207.155 (Michie Supp. 1995) (registrant data is provided to the "board of trustees of the county school district in which the sex offender expects to reside" if the victim was under eighteen; the board may release the data to educational personnel if the release is "reasonably necessary" for the protection of the public); Okla.Stat.Ann. tit. 57 § 584 E (West Supp. 1997) (registrant information is available to public and private elementary schools within the jurisdiction, child care facilities licensed by the state within the jurisdiction, any state agency that licenses individuals to work with children; the State Office of Personnel Management, and other entities that provide services to children; registrant's home address is made available only to public and private elementary schools); Va.Code Ann. § 61-8F-5 (Michie Supp. 1996) (notification is given to local law enforcement, the county superintendent of schools where the registrant is expected to reside,

child protective services and all community organizations or religious organizations which regularly provide services to youths in the county where the registrant is expected to reside; others may petition the court for access to registrant information.)

A number allow information to be disseminated at the discretion of local law enforcement officials when determined to be in the interest of public safety. Ariz.Rev.Stat.Ann § 13-3825 (West 1996); Colo.Rev.Stat.Ann. § 18-3-412.5(6.5) (West Supp. 1996) ("basic identification information" including photograph and criminal history information); 730 Ill.Comp.Stat. §§ 150/9, 152/120 (West Supp. 1996) (information may be released to those "likely to encounter" child sex offenders); La.Rev.Stat.Ann. § 15:546 (1995); Miss. 45-33-17 (Law. Co.op. Supp. 1996); Mont.Code Ann § 46-23-508(2) (1994) (department must petition the court for an order allowing the release of information); N.D.Cent.Code § 12.1-32-15(10) (Butterworth Supp. 1995); Tenn.Code Ann. § 40-39-106(c) (Michie Supp. 1996); Wash.Rev.Code Ann § 4.24.550 (West Supp. 1997).

Six states have enacted tier notification systems. Under the tier notification scheme, an offender's risk of recidivism is evaluated and categorized, typically as falling into one of three levels: low, moderate or high. The level of access and/or notification to the public depends upon the category into which the offender is placed. *See* Conn.Gen.Stat.Ann. § 54-102r (1996); Mass.Gen.Laws Ann. ch. 6 § 178K (West Supp. 1996) (if the risk is low, the public can gain access to the information upon request; if the risk is moderate, law enforcement officials must notify organizations in the community who are likely to encounter the

individual; if the risk is high, law enforcement officials must notify organizations in the community and members of the public who are likely to encounter the individual); Minn.Stat.Ann. § 244.052, subd. 4 (West Supp. 1997), *effective* January 1, 1997 (if the risk is low, law enforcement may disclose registrant information to victims or witnesses to the offense; if the risk is moderate, information may be disclosed to agencies or groups likely to encounter the individual and to establishments and organizations that serve those likely to be victimized; if the risk is high, information may be disclosed to members of the community who are likely to encounter the individual); N.J.Stat.Ann. § 2-C:7-7 (1995) (if the risk is low, registrant information is released only to law enforcement agencies; if the risk is moderate, law enforcement must notify organizations in the community; if the risk is high, law enforcement must notify organizations in the community and individual members of the public who are likely to encounter the offender); N.Y.Correct.Law § 168-l (1996) (if the risk is low, notice shall be given to law enforcement agencies;[6] if the risk is moderate, law enforcement officials may disseminate the registrant's approximate address (based on his/her zip code), the crime for which the registrant was required to register, his/her modus of operation, the type of victim and any other special conditions relevant to the registrant; if the risk is high, law enforcement officials may disseminate the registrant's actual address, photograph, crime, modus of operation, type of victim and special conditions); R.I. Gen. Laws § 11-37.1-12

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[6] The "900" line access is available for all tiers.

(Michie Supp. 1996) (substantially similar to the New Jersey provision).

2. The Lower Federal and State Courts Already Have Begun To Reach Differing Conclusions Regarding the Constitutionality Of Such Statutes.

Successful challenges to the imposition of sex offender *registration* statutes have been rare. The lower federal and state courts have consistently found *registration* to be a valid regulatory measure rather than a method of increased punishment for the registrant. See *State v. Myers*, App. A; *Doe v. Pataki*, 1996 WL 539830 (S.D.N.Y.); *Artway v. Attorney General of New Jersey*, 876 F.Supp. 666, 688 (D.N.J. 1995); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 405 (N.J. 1995); *State v. Manning*, No. C7-94-2242, 532 N.W.2d 244, 249 (Minn. App. 1995); *People v. Starnes*, 273 Ill.App.3d 911, 653 N.E.2d 4, 7 (Ill. 1995); *Snyder v. State*, No. 95-174, 912 P.2d 1127, 1132 (Wyo. 1996); *State v. Costello*, 138 N.H. 587, 643 A.2d 531, 534 (N.H. 1994); *State v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1074 (Wash. 1994); *Rowe v. Burton*, 884 F.Supp. 1372, 1385 (D.Alaska 1994); *State v. Sorrell*, No. 95-136, 656 So.2d 1045, 1048 (La. App. 5 Cir. 1995) (upholding registration as a condition of probation); *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217, 1224 (Ariz. 1992); *People v. Adams*, 144 Ill.2d 381, 581 N.E.2d 637, 644 (Ill. 1991). But see *In re Reed*, 191 Cal.Rptr. 658, 663 P.2d 216, 222 (Cal. 1983) (registration requirement for sex offenders convicted under misdemeanor lewd and lascivious statute constituted cruel and unusual punishment); *Louisiana v. Payne*, No. 93-KA-0495, 633 So.2d 701, 703 (La. Ct. App. 1993).

However, there is a considerable divergence of opinion in the lower courts regarding the constitutionality of the various *notification* and *disclosure* provisions. Proactive *notification* systems (those in which governmental officials have either a duty or the discretion to notify specified persons of the registrant's presence in the community) have faced constitutional challenges with differing results. See e.g. *Roe v. Office of Adult Probation*, 1996 WL 494770 (D.Conn.) (Granting preliminary injunction against the retroactive application of a two tiered system of notification); *Opinion of the Justices to the Senate*, 423 Mass. 1201, 668 N.E.2d 738, 753 (Mass. 1996) (proposed three tiered system of notification was not facially invalid); *Doe v. Pataki*, 1996 WL 539830 (S.D.N.Y.) (three tiered system is punishment in violation of the *Ex Post Facto* Clause); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 405 (N.J. 1995) (three tiered system does not impose punishment); *Artway v. Attorney General of New Jersey*, 876 F.Supp. 666, 692 (1995) (tiers two and three, which involve notification to persons other than law enforcement officials, are punishment in violation of the *Ex Post Facto* Clause); *W.P. v. Poritz*, 931 F.Supp. 1199, 1219 (D.N.J. 1996) (three tiered system does not impose punishment for due process or *ex post facto* purposes); *State v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1074 (Wash. 1994) (discretionary notification not punishment when scope of disclosure is limited to degree of threat posed); *Stearns v. Gregoire*, No. C95-1486 (D.Wash. 1996) (denying preliminary injunction against public notification portions of the Washington act).

On the opposite end of the spectrum, passive notification systems (those in which government officials

have no affirmative duty to notify members of the public but make the information available upon request), such as the Kansas scheme, have likewise not escaped constitutional scrutiny. See *State v. Myers*, App. A (public access to registrant information is punishment in violation of the *Ex Post Facto* Clause); *Rowe v. Burton*, 884 F.Supp. 1372, 1385 (1994) (granting preliminary injunction against imposition of registration act which allowed disclosure of registrant's name, address, birth date, photograph, place of employment, underlying reason for registration, crime of conviction, date, place and court of conviction and length of sentence). *But see Nitz v. Otte*, No. A95-486 CI (JWS) (1996), in which the court reassessed its ruling in *Rowe* and refused to enjoin application of the Alaska registration act because the balance of hardships weighed in favor of the public. The court stated that it "found it less likely than it did in *Rowe* that the Registration Act will be held to violate the Ex Post Facto Clause." Id. at 17.

Because of the positions already taken by the lower federal and state courts, it has become increasingly difficult for state lawmakers to determine what access/notification/disclosure systems will pass constitutional muster. Due to the considerable litigation and uncertainty surrounding this area and the unquestionably important impact on both the rights of the public and particular individuals, this Court should grant plenary review of this case to provide guidance and clarity in this important and difficult area of law.

CONCLUSION

For the foregoing reasons, the State of Kansas respectfully requests that this Court grant this petition for a writ of certiorari and set this case for plenary review. In the alternative, and at a minimum, this Court should hold this petition for decision following its decision on the merits of *State v. Hendricks*, No. 95-1649, and *Hendricks v. State*, No. 95-9075 (to be argued December 10, 1996), which, among other issues, involves an *ex post facto* challenge to the Kansas Sexually Violent Predator Act, Kan.Stat.Ann. § 59-29a01 *et seq.* (1995).

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 74,078

STATE OF KANSAS,
Appellee,

v.

KYM E. MYERS,
Appellant.

Appeal from Lyon district court; PAUL W. CLARK, assigned judge. Opinion filed August 23, 1996. Affirmed in part and reversed in part.

The Opinion of the court was delivered by

SIX, J.: This difficult case resolves the claim of defendant Kym Myers that the Kansas Sex Offender Registration Act (KSORA), K.S.A. 22-4901 et seq., as applied to him, violates the Ex Post Facto Clause of the United States Constitution. The determinative issue is whether KSORA constitutionally may be applied to Myers, whose offense was committed before April 14, 1994, the date KSORA took effect.

Myers was convicted in 1991 of one count of sexual battery, K.S.A. 21-3517 (Ensley 1988) and one count of rape, K.S.A. 21-3502 (Ensley 1988). The Court of Appeals reversed his convictions and remanded the case for a new trial in an unpublished opinion filed September 3, 1993. We affirmed the Court of Appeals. See *State v. Myers*, 255 Kan. 3, 872 P.2d 236 (1994). After remand, Myers pleaded no contest on August 15, 1994, to the aggravated sexual battery (K.S.A. 21-3518 [Ensley 1988]) of his 17-year-old victim, who was assisting her mother in cleaning Myers'

law office. Myers was ordered to be processed under KSORA as a "sex offender." A KSORA sex offender is any person convicted of a named offense on or after July 1, 1993. Aggravated sexual battery is a named offense. K.S.A. 22-4902(a), (b)(9), and K.S.A. 22-4910. We note that if Myers' 1991 convictions had been affirmed, he would not be subject to KSORA classification as a sex offender. After his plea in 1994, Myers filed a motion to eliminate the requirement of KSORA registration. He challenged the constitutionality of KSORA as ex post facto legislation violating Art. I, § 10 of the United States Constitution. Myers' motion was denied, and he appealed. Our jurisdiction is under K.S.A. 20-3017. (We granted Myers' motion to transfer to this court.)

We deny Myers' ex post facto claim as to registration. The registration requirements of KSORA (K.S.A. 22-4904, K.S.A. 22-4906, and K.S.A. 22-4907) are remedial and thus constitutional. As applied to Myers, the public disclosure provision, K.S.A. 22-4909, imposes punishment in violation of the Ex Post Facto Clause. Myers is required to register under KSORA. However, his registration shall not be open to public inspection and shall not be subject to the provisions of the Kansas Open Records Act, K.S.A. 45-215 *et seq.*

Myers asserts, for the first time on appeal, two additional constitutional issues that were not argued before the district court, *i.e.*, KSORA (1) constitutes cruel and unusual punishment and (2) violates due process guarantees. We do not reach these additional issues.

FACTS

Myers was sentenced to 2 to 5 years after his August 1994 no contest plea. He was given credit for time served in prison and was placed on probation for 1 year. Myers had no prior convictions. The district court ruled, over Myers' objection, that KSORA applied.

Myers raised the ex post facto issue in his pro se brief supporting his motion to modify probation conditions to eliminate registration under KSORA:

> "The defendant did thereafter register at the Johnson County Sheriff's Office. Since that time the Defendant's name and address have appeared both on television and in local newspapers naming him as a convicted sex offender. As a result of this the Defendant has been evicted from a rental unit occupied by his family, and is currently on the verge of being evicted and forced to leave his current residence."

The Record Below

At the hearing in the district court, both sides agreed that Myers' motion to eliminate the requirement to comply with KSORA presented a question of law and could be handled by oral argument. The judge responded: "Well, to me if we can handle it by argument and proffers through oral statement, unless you all have some evidence that you want to present on the other side. . . . " After Myers' attorney advanced the ex post facto argument and presented Myers' pro se brief on that issue, Myers requested permission to address the court. The judge admonished him: "Well, Mr. Myers, I'll allow you to speak. Reserve it to whatever legal matter in rebuttal

that you might wish to make and that in addition to your brief." Despite the admonishment, during his argument, Myers described his life as a registered sex offender:

> "Now, [registration] has caused me more problems than going to prison. I was evicted from my mother's apartment; left me virtually homeless. I had nowhere to go. I didn't have anyone to rent to me. I didn't know what to do. I had to go to a halfway house. I've been on television. I've been in – Overland Park publishes this every Friday. "I can't live like this and every morning I get up to look at the paper – I'm paranoid.
>
> I can't take this. I'm about ready to crack, okay? I live with 12 other guys. They are about ready to kick me out on the street. I have no money. I don't know what I'm going to do. At least in prison I knew I had a place to sleep. I would rather go back to prison. I can't do this."

Myers' statements, which were not under oath, went beyond the restrictions that the judge imposed. The State neither objected to nor disputed the statements. The State did not request that Myers testify under oath. Both sides had agreed, and the judge specifically mentioned, that oral proffers could be made.

Although Myers did not specifically designate his statements concerning his housing difficulties as a proffer, under the circumstances, we view them as such. Myers' statements about the consequences he suffered because of registration provide a sufficient record to consider the ex post facto issue.

DISCUSSION

The State asserts that KSORA is not an ex post facto law because it is neither punitive in nature or effect. According to the State, KSORA is a regulatory statute designed for the legitimate governmental goals of public safety and law enforcement assistance. The State claims that any stigma or ostracism faced by Myers in his personal or professional life is due not to registration and disclosure, but to his underlying conviction as a sex offender.

The Federal Statute

42 U.S.C. § 14071 (1994), the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act (the Act), was enacted as part of the federal Violent Crime Control and Law Enforcement Act of 1994. The Act encourages states to implement registration programs for sex offenders against children in order for the state to be eligible for certain federal funds for drug control. However, the Act does not require that states apply their sex-offender registration laws retroactively. The Act was amended May 17, 1996 (to be cited as Megan's Law), authorizing disclosure for any purpose permitted under state law: A law enforcement agency "shall release relevant information that is necessary to protect the public concerning a specific person required to register." Pub.L. No. 104-145, 110 Stat. 1345 (1996).

Sex Offender Registration Laws in Other States

A review of the laws of other states concerning sex offenders and their public disclosure provisions, if any, is helpful in considering the constitutionality of KSORA as applied to Myers. All 50 states have enacted sex offender registration laws of varying scope. For a listing of 50 states and their sex offender registration laws see *People v. Ross*, No. 681/93, 1996 WL 393282, *3, (N.Y.Sup. July 2, 1996).

Although the laws in a heavy majority of the states still require that the registry information be kept confidential and made available for use only by law enforcement agencies, some of the more recently enacted registration laws (such as in Iowa, North Carolina, and Vermont) show a trend toward limited public disclosure. For example, the Iowa and North Carolina statutes allow disclosure of registry information for a specifically requested name to the person making the request. Iowa Code Ann. § 692A.13(6) (West 1996 Supp.); N.C. Gen. Stat. § 14-208.10(a) (1995 Supp.). In Vermont, when the newly enacted statute becomes effective on September 1, 1996, certain authorized employers can request registry information when necessary to protect the public. 1996 Vt. Laws P.A. 124, § 1 (to be codified at Vt. Stat. Ann. tit. 13, § 5402[3]).

Many registration laws apply to persons committing sex offenses before the effective dates of the laws. See, *e.g.*, Mich. Comp. Laws Ann. § 28.723 (West 1996 Supp.) (sex offenders convicted after October 1, 1995, or convicted on or before that date but on probation or parole or in jail on that date required to register).

In a few states, such as New Jersey and New York, the laws provide for community notification concerning certain registered sex offenders, depending on the risk level of the offender. See N.J. Stat. Ann. §§ 2C: 7-6, 7-8 (West 1995); N.Y. Correct. Law § 168-l(6) (McKinney 1996 Supp.). The New Jersey provisions apply to persons committing certain sex offenses whose conduct is characterized by compulsive, repetitive behavior, regardless of when the offenses were committed. N.J. Stat. Ann. § 2C: 7-2(b)(1) (West 1995). See *Opinion of the Justices to the Senate*, No. SJC-07224, 1996 WL 406208 (Mass., July 18, 1996) in which the Supreme Judicial Court of Massachusetts answered questions concerning the constitutionality of pending S.B. 2276 proposing a sex offender community notification law modeled after New Jersey's.

In Pennsylvania, the newly enacted community notification provisions expressly apply only to persons committing sex offenses after the effective date of the law, thus avoiding an ex post facto challenge. 42 Pa. Cons. Stat. Ann. § 9793 (1996 Supp.).

Myers points out that, besides the Kansas statute, only the Georgia and South Dakota statutes allow unrestricted public access to registrant information and South Dakota does not permit publication of the information. Ga. Code Ann. §§ 42-9-44.1(e) (1994); S.D. Codified Laws Ann. § 1-27-1 (1996 Supp.); and S.D. Codified Laws Ann. § 22-22-40 (1996 Supp.). Also, Georgia's statute applies only to child sex offenders, Ga. Code Ann. § 42-9-44.1(a) (1994), and South Dakota limits the offender's duty to register to fewer crimes than does Kansas. S.D. Codified Laws Ann. § 22-22-30 (1996 Supp.). Myers contends he

would not have been required to register under either the Georgia or South Dakota acts.

We observe that Illinois has enacted a child sex offender community notification law which became effective June 1, 1996. Ill. Comp. Stat. Ann. ch. 730, 152/101 *et seq.* (Smith-Hurd 1996 Supp.). That law provides for retroactive application, limited community notification, and public access to registry information on child sex offenders. Ill. Comp. Stat. Ann. ch. 730, 152/125(c) (Smith-Hurd 1996 Supp.).

Myers suggests that KSORA's disclosure provision is the broadest in the country. The State characterizes KSORA, which allows public access as opposed to mandating dissemination of such information, as being in the "middle" regarding disclosure. We have found no other state's disclosure statute to be broader than KSORA's.

The Ex Post Facto Clause of the United States Constitution

Myers contends that KSORA is criminal in nature because it is punitive in both purpose and effect. Because KSORA is punitive, Myers reasons, its application to him is ex post facto and unconstitutional. Myers' offense occurred before April 14, 1994, the date KSORA took effect. See L. 1994, ch. 107, § 10.

The constitutionality of a statute is a question of law; thus, we exercise an unlimited, de novo standard of review. See *State v. Mertz*, 258 Kan. 745, 748, 907 P.2d 847 (1995).

We are mindful of the frequently stated rules applied when a statute is questioned as unconstitutional:

> "The constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt." *State v. Bryan*, 259 Kan. 143, Syl. ¶ 1,910 P.2d 212 (1996).

Our focus is upon the application of KSORA to Myers' factual situation. Article I, Section 10, of the United States Constitution provides: "No State shall . . . pass any . . . ex post facto Law."

The Ex Post Facto Clause encompasses:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*" *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798).

The *Calder* categories were rephrased in *Beazell v. Ohio*, 269 U.S. 167, 169-70, 70 L. Ed. 216, 46 S. Ct. 68 (1925):

> "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done, *which makes more burdensome the punishment for a crime, after its commission*, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." (Emphasis added.)

In *Collins v. Youngblood*, 497 U.S. 37, 50, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990), the Court re-adopted the *Calder* categories, as rephrased in *Beazell*. *Kring v. Missouri*, 107 U.S. 221, 228-29, 27 L. Ed. 506, 2 S. Ct. 443 (1882), was overruled to the extent *Kring* had broadened those categories to include any change which "alters the situation of a party to his disadvantage." Our analysis in Myers' case concerns whether KSORA "makes more burdensome the punishment for a crime, after its commission." Ex post facto laws are particularly objectionable because they deprive their object of all notice. See, *e.g.*, *Miller v. Florida*, 482 U.S. 423, 429-30, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987); *Weaver v. Graham*, 450 U.S. 24, 30, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981).

"These [including the Ex Post Facto Clause] are towering constitutional provisions of great importance to individual dignity, freedom, and liberty." *John Doe v. Poritz*, 142 N.J. 1, 43, 662 A.2d 367 (1995).

> "James Madison emphasized their fundamental role in our Constitution:
>
> > 'Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts,

> are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights.'
>
> [The Federalist No. 44, at 301 (James Madison) (Jacob E. Cooke ed., 1961).]" 142 N.J. at 113 (Stein, J., dissenting).

The constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them. *Collins*, 497 U.S. at 41. In *State v. Nunn*, 244 Kan. 207, 219, 768 P.2d 268 (1989), we applied the following two-step analysis prescribed in *Graham*, 450 U.S. at 29, for determining whether a statute is an ex post facto law: " 'For a criminal or penal law to be ex post facto, two elements must be present: the law "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." [Citations omitted.]' "

The State concedes that the statute applies retroactively to Myers. Thus, we concentrate on the penal element of the ex post facto test as modified by *Collins*: Does KSORA impose punishment on Myers?

The Court in *De Veau v. Braisted*, 363 U.S. 144, 160, 4 L. Ed. 2d 1109, 80 S. Ct. 1146 (1960), held that a statute

barring certain unions on the New York waterfront from collecting dues if any union officers or agents were ex-felons was not an ex post facto law, reasoning:

> "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation. . . . "

If the legislative intent of the statute is to punish, then the inquiry is ended. See *Trop v. Dulles*, 356 U.S. 86, 95-96, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (statute revoking citizenship for military desertion held invalid as cruel and unusual punishment).

We turn now to an examination of legislative intent.

Legislative Intent

The State concedes that KSORA contains no express statement of legislative intent or purpose. However, both parties have cited legislative history. Myers argues that the legislative history shows punitive intent. The State counters that the intent is regulatory. We agree with the State.

The Habitual Sex Offender Registration Act was first enacted in 1993 as K.S.A. 1993 Supp. 22-4901 *et seq.* L. 1993, ch. 253, § 17. It was amended in 1994 and renamed the "Sex Offender Registration Act" (KSORA). L. 1994, ch. 107, § 1. The 1993 version applied to "habitual sex offenders," defined at K.S.A.1993 Supp. 22-4902(a) as those convicted a "second or subsequent time" after the

effective date of the act for a sexually violent crime. Myers, who had no previous conviction, would not be a sex offender required to register under the 1993 act.

K.S.A.1993 Supp. 22-4909 provided:

> "The statements or any other information required by this act shall *not be open to inspection by the public* and specifically are *not* subject to the provisions of the Kansas open records act, K.S.A. 45-215 *et seq.*, and amendments thereto, nor may this data be obtained by any person other than a law *enforcement officer* or other individual as may be *authorized specifically by law.*" (Emphasis added.)

KSORA defined "sex offender" as anyone convicted of a sexually violent crime after the effective date of the act. K.S.A. 22-4902(a). Although K.S.A. 22-4910 states that July 1, 1993, is the effective date, L. 1994, ch. 107, § 10 provides: "This act shall take effect and be in force from and after its publication in the Kansas register." KSORA was published in the Kansas Register on April 14, 1994.

The offender is required to register within 15 days of coming into any county of residence or where temporarily domiciled more than 15 days. K.S.A. 22-4904. The offender is required to register for 10 years from the first conviction or release from confinement, and upon a second or subsequent conviction, for life. K.S.A. 22-4906. *The most significant change was the elimination of confidentiality of the information required with registration.*

K.S.A. 22-4909 provides:

> "The statements or any other information required by this act shall be open to inspection

> in the sheriff's office by the public and specifically are subject to the provisions of the Kansas open records act, K.S.A. 45-215 et seq., and amendments thereto."

KSORA was passed in the wake of public outcry following the tragic July 1993 murder of Stephanie Schmidt by Donald Ray Gideon, a co-worker who had prior convictions for rape and aggravated sodomy. See *State v. Gideon*, 257 Kan. 591, 595-96, 614, 894 P.2d 850 (1995).

After the murder, Stephanie's parents helped form an ad hoc task force which proposed legislation concerning sex offenders, including H.B. 2661 (which became KSORA). Several people from the task force testified before the House Committee on Judiciary in favor of H.B. 2661, as did the Attorney General. Excerpts from the Minutes of the House Committee on Judiciary for January 26, 1994 show that the overriding concern behind H.B. 2661 was promotion of public safety with public access to information on the criminal history of released sex offenders.

> "Our final work product is for Stephanie, but more importantly our work and the work of others will hopefully prevent future tragedies. . . .
>
> . . . .
>
> "These bills will make more information available to the public in order to help protect them from a class of criminal which is very likely to repeat and repeat its crimes." Statement of Representative Gary Haulmark.

"It is up to you to take bold steps forward in the prevention and awareness required to save lives: lives like Stephanie's . . . lives like your children's and . . . lives of your families and the lives of all Kansans.

. . . .

"Stephanie's death was the second offense of her rapist/murderer. Now that she has been killed, the law says her assailant should register. Had he been registered in the first place, Stephanie might be alive today. . . .

. . . .

"The two bills before you will make a difference. [The second bill, H.B. 2660, would have required probation officers to notify employers by mail if they have hired a sexually violent felon. H.B. 2660 was not enacted.] They will allow the living to take precautionary steps: to make decisions that would save their lives." Statement of Stephanie's mother, Peggy Schmidt.

"I would encourage you to pass these bills [H.B. 2660 and 2661] and to step forward boldly and proudly. Make these protective steps to help the public through awareness of any sex offender's release; protective steps to promote the rights of employers to know who they are hiring, and protective steps that would hold the rights of public safety over and above the rights of convicted felons, murderers, and rapists." Statement of Stephanie's father, Gene Schmidt.

"Another problem with the current law is that the registration information is only open to law enforcement agencies, not the community. For it to be available to the public is an invasion of the criminals' right to privacy. But isn't it an

> invasion of rights when those criminals turn around and rape or murder innocent individuals?" Statement of Stephanie's sister, Jeni Schmidt.
>
> "The current law requires sex offenders to register only after the second offense. Countless studies have shown that more often than not a sex offender's 'first' offense is actually just the first time he or she has been caught. Why give them yet another opportunity to cause more damage and destroy more lives?
>
> "The registration information needs to be open to the public, not just to law enforcement agencies as it is under the current law. The purpose of the registration is to protect the public, but how can we do that if the public doesn't have the right to know when a convicted offender is residing in their community – in fact may be their next door neighbor, or someone they work with?" Statement of Robert T. Stephan, Attorney General.

The Senate Committee on Judiciary also held hearings on H.B. 2661. Statements similar to those made before the House Committee on Judiciary were presented. Minutes of Senate Committee on Judiciary, March 21, 1994.

A representative of the American Civil Liberties Union expressed constitutional concerns in opposing H.B. 2661 and H.B. 2660.

We conclude that the legislative history suggests a nonpunitive purpose – public safety. However, our analysis does not end with our "public safety" conclusion. Even when the legislative intent behind the statute is

nonpunitive, we should ask whether the "statutory scheme was so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248-49, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980). " '[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.' " 448 U.S. at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 [1960]). The legislation must be examined to determine if, in Myers' situation, KSORA has a punitive effect sufficient to negate the nonpunitive purpose.

The Punitive/Nonpunitive Effect Review

In many cases involving ex post facto challenges to sex offender registration statutes, courts have applied the factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963), to determine whether the statute's effect is punitive. *Mendoza-Martinez* held that divesting American citizenship for draft evasion or military desertion was "punishment" and the procedural protections of the Fifth and Sixth Amendments applied. 372 U.S. at 167. The factors are:

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment – retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to

> the alternative purpose assigned. . . . " 372 U.S. at 168-69.

See *Doe v. Pataki*, 919 F.Supp. 691, 700 (S.D.N.Y.1996); *Rowe v. Burton*, 884 F.Supp. 1372, 1378 (D.Alaska 1994); *State v. Noble*, 171 Ariz. 171, 175, 829 P.2d 1217 (1992); *State v. Manning*, 532 N.W.2d 244, 247 (Minn.App.1995); *State v. Ward*, 123 Wash.2d 488, 499, 869 P.2d 1062 (1994). Courts have applied the *Mendoza-Martinez* factors when the legislature has not indicated whether the statute is intended to be punitive or regulatory, *Manning*, 532 N.W.2d at 247, or when conclusive evidence of legislative intent is unavailable. *Ward*, 123 Wash.2d at 500. The *Mendoza-Martinez* factors have been applied even when the statutory design was found to display a purpose to regulate and not to punish. *Burton*, 884 F.Supp. at 1377-78.

Other courts, in considering ex post facto challenges to sex offender registration statutes, have rejected the *Mendoza-Martinez* factor analysis. See *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1262, *reh. denied* 83 F.3d 594 (3d Cir.1996):

> "Nevertheless, like the New Jersey Supreme Court in *Doe* [*v. Poritz*], 142 N.J. at 63-73, 662 A.2d 367, we think it wise to heed the Supreme Court's advice: *Mendoza-Martinez* is inapplicable outside the context of determining whether a proceeding is sufficiently criminal in nature to warrant criminal procedural protections of the Fifth and Sixth Amendments. See *Austin* [*v. United States*, 509 U.S. 602, 610 n. 6, 125 L. Ed. 2d 488, 113 S. Ct. 2801, 2806 n. 6 (1993)]."

See also *Opinion of the Justices*, 1996 WL 406208, *12 ("without some indication of the weight and priority of

these [*Mendoza-Martinez*] factors, however, that test risks an unmanageable indefiniteness.").

The New Jersey Supreme Court in *John Doe* concluded that the *Mendoza-Martinez* test was not relevant to an ex post facto analysis. *John Doe* observed that the *Mendoza-Martinez* Court "nowhere suggest[ed] that consideration of all of the factors together is somehow the legally required method of resolving the issue" of whether a statute was penal or regulatory. 142 N.J. at 65. *John Doe*, after rejecting the *Mendoza-Martinez* factors, describes the method of determining "punitive impact":

> "We do not hold that legislative intent is the sole determinant of 'punishment' despite the dissent's claim that we do. Obviously, what the Legislature does is as important as what it says. Characterization of a provision or sanction as punishment depends, as we have noted, not only on the legislative purpose but on the implementing provisions. If the implementing provisions go beyond that regulatory purpose – if they are 'excessive' in fact – and have a punitive impact, punishment results, regardless of claimed regulatory intent. That is the central thrust of *Austin* [*v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993),] and [*United States v.*] *Halper* [,490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989),] and of our analysis in this opinion." 142 N.J. at 75.

In resolving whether a statute has such a punitive impact as to make it punishment, the *Artway* court speaking through Judge Becker, in a scholarly analysis, synthesized several recent United States Supreme Court cases (*California Dept. of Corrections v. Morales*, 514 U.S. ___, 131

L. Ed. 2d 588, 115 S. Ct. 1597 [1995]; *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 114 S. Ct. 1937 [1994]; *Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488l, 113 S. Ct. 2801 [1993]; and *Halper*, 490 U.S. 435). 83 F.3d at 1254-61. The Third Circuit in *Artway* developed a three-prong test for declaring when a legislative act constitutes "punishment" for ex post facto and double jeopardy purposes: whether (1) the actual purpose of the law is punitive or remedial, (2) the objective purpose is punitive or remedial, and (3) its effect is sufficiently punitive. The objective purpose prong, in turn, had three subparts. Applying this three-prong test to New Jersey's sex offender registration law, known as Megan's Law, *Artway* determined that the registration requirements of the law did not violate the Ex Post Facto Clause or the Double Jeopardy Clause. 81 F.3d at 1264-67. The claims concerning the notification portion of the law were not ripe for review because Artway had left New Jersey and had yet not been classified as an offender subject to notification. 81 F.3d at 1246-53.

W.P. v. Poritz, No. CIV. A. 96-97, 1996 WL 374036 (D.N.J. July 1, 1996), addressed ex post facto and double jeopardy claims concerning the notification provisions in Megan's Law. W.P. arose from a class action filed by New Jersey sex offender registrants who had been notified of their classifications as Tier II (moderate risk) or III (high risk) offenders for sex offenses committed before the effective date of the law. Upholding the notification provisions against those claims, *W.P.* followed the outlines of the test set forth in *Artway*, but noted that *United States v. Ursery*, ___ U.S. ___, ___ L. Ed. 2d ___, 116 S. Ct. 2134 (1996), decided after *Artway*, "alters the analysis to be

employed in the case at bar." *W.P.*, 1996 WL 374036, 6. The *W.P.* court said:

> "*Ursery* expressly rejects the philosophical foundation of *Artway*: that a universal rule for the definition of 'punishment' can and should be derived through a 'synthesis' achieved from analyzing the Supreme Court's recent decisions in *Halper, Austin, Kurth Ranch* and *Morales*. . . .
>
> "The Supreme Court has now stated that *Halper, Austin, Kurth Ranch,* (by implication *Morales*), and now *Ursery cannot be employed to establish a 'synthesis' that generates a universal analytical framework for defining 'punishment' in all cases." 1996 WL 374036, 7.

However, W.P. observed that certain considerations common to those cases should be employed in deciding whether the notification provisions imposed "punishment":

> "These common considerations are the expressed intent of the legislature as reflected in the legislation itself and the legislative history; the 'purpose' of that legislation, viewed objectively, particularly if that demonstrates a potential for a more punitive objective; a balancing of remedial and punitive goals; an analysis of how such laws have been considered historically, if there is any clear historical analogue; and a review of the 'effect' of such legislation, if that effect is extreme or severe." 1996 WL 374036, 7.

W.P. noted further:

> "What *Ursery* teaches us, however, is that such considerations may not be transformed into a

> rigid series of hurdles which must be surmounted, one after the other, before the legislation can survive an ex post facto or double jeopardy challenge. Rather this Court, in an analysis similar to that in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (although the factors considered are not identical), must weigh these considerations in a less structured fashion to reach its decision." 1996 WL 374036, 7.

Because of the importance of *Halper* and *Austin* in the punitive/nonpunitive analysis of sex offender registration and disclosure statutes advanced in *John Doe* and *Artway*, we turn to a review of *Ursery*. *Ursery* considered the *Mendoza-Martinez* factors in its double jeopardy analysis. In *Ursery*, the Court considered whether civil forfeiture proceedings under 21 U.S.C. § 881(a)(6) and (7) (1994) violated the Double Jeopardy Clause. The Court reviewed two cases. In the Sixth Circuit case, *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), the government initiated civil forfeiture proceedings against Ursery's house, alleging it had been used to facilitate illegal drug transactions. Ursery was later convicted of a drug charge. In *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), civil *in rem* proceedings were filed against certain items, including currency allegedly involved in a money laundering scheme and felonious drug transactions. The owners were later convicted on drug and money laundering charges, and forfeiture was granted against their property. The Sixth Circuit reversed Ursery's conviction, and the Ninth Circuit in *$405,089.23* reversed the forfeiture judgment, both courts relying on *Halper* and *Austin*. In a split decision (Justice Stevens dissenting; Justices Kennedy, Scalia, and Thomas concurring), the

Supreme Court reversed, distinguishing *Halper, Austin,* and *Kurth Ranch* and relying instead upon *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 79 L. Ed. 2d 361, 104 S. Ct. 1099 (1984).

The Court observed that *Halper* considered whether a civil penalty constituted "punishment" for double jeopardy purposes. In *Halper,* a fine of $130,000 was sufficiently disproportionate to the government's damages and expenses, estimated at $585, as to constitute a second punishment in violation of double jeopardy. 490 U.S. at 437, 452. The *Ursery* Court noted the historical distinction between civil forfeiture and civil penalties and that the balancing test used in *Halper* (value of the fine versus amount of the government's damages) had never been applied in forfeiture cases. 116 S. Ct. at 2145.

The *Ursery* Court also distinguished *Austin*: "The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence." 116 S. Ct. at 2147. *Kurth Ranch* was distinguished because it dealt "with a tax proceeding under the Double Jeopardy Clause." 116 S. Ct. at 2147.

After distinguishing *Halper, Austin* and *Kurth Ranch,* the *Ursery* Court stated: "[T]his Court consistently has found civil forfeitures not to constitute punishment under the Double Jeopardy Clause." 116 S. Ct. at 2147. The Court then applied the two-part test used in *89 Firearms* (taken from *Ward,* 448 U.S. at 248-49) to determine whether a forfeiture proceeding is civil or criminal in nature:

> "First, we ask whether Congress intended proceedings under 21 U.S.C. § 881, and 18 U.S.C. § 981, to be criminal or civil. Second, we turn to consider whether the proceedings are so punitive in fact as to 'persuade us that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' despite Congress' intent. *89 Firearms*, 465 U.S. at 366." 116 S. Ct. at 2147.

Finding intent that the proceedings are civil, the Court in *Ursery* moved to the second stage and found little evidence "suggesting that forfeiture proceedings . . . are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." 116 S. Ct. at 2148.

Ursery then identified the nonpunitive goals of the forfeiture provisions (encouraging property owners not to permit their property to be used for illegal purposes; ensuring people do not profit from illegal acts). 116 S. Ct. at 2148-49. The Court ended its analysis with the following:

> "Other considerations that we have found relevant to the question whether a proceeding is criminal also tend to support a conclusion that § 981(a)(1)(A) and §§ 881(a)(6) and (a)(7) are civil proceedings. See *Ward*, [448 U.S. at] 247-248, n. 7, 249 (listing relevant factors and noting that they are neither exhaustive nor dispositive)." 116 S. Ct. at 2149.

The cite to *Ward* refers specifically to the *Mendoza-Martinez* factors. The Court then discussed four of those factors, finding that (1) *in rem* civil forfeiture has historically not been regarded as punishment; (2) the government need not demonstrate scienter to establish

forfeiture; (3) though forfeiture may serve the purpose of deterrence, that purpose may serve civil as well as criminal goals; and (4) though the statutes are tied to criminal activity, this was not sufficient to render the statutes punitive. 116 S. Ct. at 2149. *Ursery* blunted deterrence as a factor pointing toward penal effect, at least in the forfeiture context.

Because *Ursery* was decided on the grounds that civil *in rem* forfeiture was determined not to impose punishment for double jeopardy purposes, the majority's use of the two-part test from *89 Firearms* (including the *Mendoza-Martinez* factors) for determining whether a proceeding is criminal in nature implies that the *Mendoza-Martinez* factors should be considered as part of the determination of whether punishment has been imposed. *Ursery* leaves open the question of whether that same test should be used as part of ex post facto analysis.

The majority in *Ursery* labeled the sweeping language in *Halper* to the effect that "[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" as dictum. *Halper* was confined to the narrow context of its own facts: a civil penalty vastly disproportionate to the governments damages and expenses. 116 S. Ct. at 2145, n. 2.

The *W.P.* court read *Ursery* as changing the approach the Third Circuit used in *Artway* to a less rigid one. The "considerations" used in *W.P.* to determine if the Megan's Law notification provision imposed punishment, 1996 WL 374036, 7, are similar to the two-part test in *Ward, 89 Firearms,* and *Ursery,* with a few of the *Mendoza-Martinez*

factors added. Although often re-labeled, the *Mendoza-Martinez* factors continue to reappear in some form in ex post facto and double jeopardy analysis. Certain factors are given more weight in the analysis and others totally disregarded, depending on the context. We conclude that *Ursery* has endorsed the *Mendoza-Martinez* factors for consideration in the punitive/nonpunitive effect analysis.

Ex Post Facto Challenges in Other Jurisdictions

Sex offender registration and disclosure statutes have been constitutionally challenged, often on the grounds that such statutes are ex post facto laws. KSORA's disclosure section, K.S.A. 22-4909, appears to be the broadest provision to receive an ex post facto challenge. Neither the parties in this case nor our independent research have located a case upholding the constitutionality of a sex offender statute providing for unlimited public disclosure. Statutes held constitutional when challenged on ex post facto grounds have provided for: no public disclosure, see, *e. g., Snyder v. State*, 912 P.2d 1127, 1129 (Wyo.1996) (Wyoming statute allows access only to those already authorized by law to receive criminal history information); limited disclosure, see, *e.g., Noble*, 171 Ariz. at 176 (in Arizona, information only available in statutorily specified circumstances where it serves regulatory purpose); or carefully tailored community notification, see, *e.g., John Doe v. Poritz*, 142 N.J. 1, 74, 662 A.2d 367 (1995) (New Jersey statute tailors scope of notification to offender's risk level).

Of the sex offender registration laws that have successfully overcome ex post facto challenges, none have

provided for unlimited public access to the registered sex offender information. See, *e.g.*, *Opinion of the Justices*, 1996 WL 406208, *15 (pending Massachusetts legislation proposing community notification law not facially punitive); *John Doe*, 142 N.J. at 73-75 (under New Jersey law, community notification appropriate only after a due process hearing involving judicial review determining that the offender poses sufficient risk); *State v. Costello*, 138 N.H. 587, 590, 643 A.2d 531 (1994) (New Hampshire registered information kept confidential by authorities); *Ward*, 123 Wash. 2d at 502 (Washington law authorizes release of sex offender registration information to the public when necessary for public protection); *People v. Starnes*, 273 Ill. App. 3d 911, 653 N.E.2d 4 (1995) (Illinois child sex offender registration information kept confidential; Ill. Cons. Stat. Ann. ch. 730, 150/9 [Smith-Hurd 1996 Supp.]); *Manning*, 532 N.W.2d at 246 (Minnesota registered information kept private and used only for law enforcement purposes).

The Arizona sex offender registration act was upheld in *Noble*, 171 Ariz. 171. The Arizona Supreme Court reviewed two conflicting Court of Appeals panel decisions, after each panel had applied the *Mendoza-Martinez* factors to determine if the registration requirement was punishment. The Arizona registration requirements were similar to those in KSORA. See Ariz. Rev. Stat. Ann. § 13-3821 (1989). Although the law contained no notification provisions, it did provide for release of information concerning the registered sex offender's record to

> "noncriminal justice agencies for evaluating prospective employees, public officials, or volunteers; governmental licensing agencies for

> evaluating prospective licensees; prospective employers and volunteer youth-service agencies whose activities involve regular contact with minors; and the department of economic security and the superior court for determining the fitness of prospective custodians of juveniles." 171 Ariz. at 176 n. 8 (citing Ariz. Rev. Stat. Ann. § 41-1750[B][8], [9], [11], [13] [1992]).

Noble reasoned that registration did not impose any affirmative disability or restraint on the offender. Registration did not restrain or inhibit the offender's movement or activities, although it did make information available in "statutorily specified circumstances where it serves a clearly regulatory purpose." 171 Ariz. at 176. *Noble* observed that registration has traditionally been viewed as punitive (referencing Nathaniel Hawthorne's The Scarlet Letter), but noted that the provisions limiting access to the information "dampen[ed] its stigmatic effect." 171 Ariz. at 177. The registration requirement served a regulatory purpose by facilitating law enforcement and aiding in investigative work, and as applied to child sex offenders (because of more significant risk of recidivism), was not excessive in relation to the nonpunitive purpose. 171 Ariz. at 177-78, *Noble* implies that if disclosure of the information had not been statutorily limited, it would be regarded as the kind of affirmative disability or restraint usually associated with criminal punishment. 171 Ariz. at 176.

The constitutionality of the Washington sex offender registration and disclosure law also withstood an ex post facto challenge. *Ward*, 123 Wash. 2d 488. The appellants in *Ward* attacked the disclosure provisions, which provided that "[p]ublic agencies are authorized to release relevant

and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection." 123 Wash. 2d at 502 (quoting Wash. Rev. Code § 4.24.550[1] [1994]). *Ward* noted that existing law already provided for public disclosure of conviction information. 123 Wash. 2d at 501.

In interpreting the statutory disclosure provisions, *Ward* judicially imposed the following restrictions:

> "We note that the statute [Wash. Rev. Code § 4.24.550(1)], on its face, requires the disclosing agency to have some evidence that the offender poses a threat to the community. Absent evidence of such a threat, disclosure would serve no legitimate purpose. Therefore, we hold that a public agency must have some evidence of an offender's future dangerousness, likelihood of reoffense, or threat to the community, to justify disclosure to the public in a given case. This statutory limit ensures that disclosure occurs to prevent future harm, not to punish past offenses.
>
> ". . . An agency must disclose only that information relevant to and necessary for counteracting the offender's dangerousness.
>
> "[T]he geographic scope of dissemination must rationally relate to the threat posed by the registered offender. . . . The scope of disclosure must relate to the scope of the danger. . . .
>
> "[W]e leave to the appropriate agencies the specific decisions of whether, what, and where to disclose within the parameters outlined above." 123 Wash. 2d at 503-04.

Ward concluded that Washington's disclosure provisions did not "alter the standard of punishment which existed under prior law," finding "that the statutory limits on disclosure ensure that the potential burdens placed on registered offenders fit the threat posed to public safety." 123 Wash. 2d at 504, 869 P.2d 1062. The disclosure provision in KSORA contains no restrictions. Registration information is "open to inspection in the sheriff's office by the public." K.S.A. 22-4909.

The Supreme Court of New Hampshire upheld that state's sex offender registration act from an ex post facto attack in *Costello*, 138 N.H. 587. The sex offender was required to register with the state police and to report a current address annually to the local law enforcement agency. *The information is kept confidential within the law enforcement community. Costello* held that the nonpenal, or regulatory purpose of the legislation was "manifest" and that the punitive effect of registration was *de minimis*. 138 N.H. at 591.

In *John Doe*, 142 N.J. 1, the New Jersey Supreme Court found New Jersey's Megan's Law to be lacking in its original form but by the court's crafting of a judicial review procedure, upheld the act against ex post facto, double jeopardy, bill of attainder, and cruel and unusual punishment attacks. *John Doe* determined that the registration and notification laws implicated a sex offender's liberty interest in privacy and reputation and triggered due process rights. The fundamental fairness doctrine required a hearing and accompanying judicial review before statutory notification of the community for sex offenders identified as moderate and high risk (Tier II and Tier III). 142 N.J. at 107, *John Doe* interpreted the

statute and judicially revised the Attorney General Guidelines on risk level assessment and notification to conform with the court's notion of what was required to provide adequate due process. The court augmented its holding in a later order by specifically outlining the procedure to be followed in such review. *John Doe* acknowledged that the "basic attack on these laws is the alleged excessiveness of community notification." 142 N.J. at 29.

State v. Babin, 637 So.2d 814 (La. App. 1994), considered conditions of parole requiring Babin, a sex offender, to notify people within a 1-mile radius of his residence and the school district superintendent of Babin's conviction. He was also required to publish notice of his conviction twice within the official journal of the local governing authority, in compliance with legislation enacted after Babin committed the crimes. Without any analysis, the *Babin* court declared the notification requirements unconstitutional as ex post facto legislation. But see *State v. Sorrell*, 656 So.2d 1045, 1048 (La. App. 1995) (Louisiana sex offender registration statute was not an ex post facto law as applied to a rapist convicted before enactment but paroled afterwards. Registration and notification requirements were imposed as a condition of parole, and the law in effect at the time of release should govern the terms of release.).

In *State v. Manning*, 532 N.W.2d 244 (Minn. App. 1995), the Court of Appeals of Minnesota determined that the Minnesota sex offender registration statute was not an ex post facto law. The registered information includes address, fingerprints, photograph, and other information required by the bureau of criminal apprehension, and such information is only to be used "for law enforcement

purposes." Minn. Stat. § 243.166 (1992 & 1993 Supps.). The *Manning* court determined that the statute did not impose an affirmative restraint or disability. *Manning* reasoned that registration is not historically regarded as punishment (*noting that the registration information is confidential*), the deterrent effect of registration is minimal, and the law has a nonpunitive purpose: to help police investigations. 532 N.W.2d at 248.

Although not an ex post facto case, the California Supreme Court determined in *In re Reed*, 33 Cal. 3d 914, 191 Cal. Rptr. 658, 663 P.2d 216 (1983), that registration was a form of punishment. The California sex offender registration statute was challenged as cruel and unusual punishment as applied to a misdemeanor offender convicted of soliciting "lewd or dissolute conduct" from an undercover officer in a public restroom. Under the statute, the misdemeanant was required to register for life with the local police as a sex offender. The offender could petition for release from the registration requirement, but there was no procedure for expungment of the initial registration. The court first consulted the *Mendoza-Martinez* factors and determined that the registration requirement was a form of punishment. The court then applied the three-part test of *In re Lynch*, 8 Cal. 3d 410, 105 Cal. Rptr. 217, 503 P.2d 921 (1972), and determined that the "punishment" was "cruel or unusual" as applied to Reed. The court noted that relatively minor conduct, such as a flirtation accompanied by touching done in a public place, could constitute an offense. Such an offender did not pose a grave threat to society, warranting permanent police surveillance.

Federal Cases

Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994), determined that plaintiff sex offenders were likely to succeed on the merits on their ex post facto challenge to the Alaska registration law and granted a preliminary injunction to prevent public dissemination of sex offender information. *Burton* held that Alaska's act violated the prohibition on ex post facto legislation, "because the law includes a provision providing for public dissemination of information concerning sex offenders whose convictions ante-date the Registration Act." 884 F. Supp. at 1380.

In engaging in an ex post facto analysis, the *Burton* court first acknowledged that the "statutory design displays a purpose to regulate present circumstances, not to punish." 884 F. Supp. at 1377. Burton then considered the *Mendoza-Martinez* factors in determining whether the law had a punitive effect. *Burton* reasoned: (1) the public dissemination provisions, which would subject the registrants to "public stigma and ostracism that would affect both their personal and professional lives," imposed an affirmative disability or restraint, showing a punitive effect; (2) registration was not a "concept which this court perceive[d] to be imbued by history with a punitive connotation"; (3) the act was premised upon "past knowingly wrongful conduct of the registrant," and therefore the scienter factor was present, indicating punitive effect, although that factor was to be given only "light weight"; (4) while the registration requirement, by itself, may have imposed only a *de minimis* burden, the public disclosure mechanism could have both a deterrent and retributive effect; (5) little weight is given to the factor of whether the behavior to which the sanction applied was already a

crime; and (6) the law had an alternative nonpunitive purpose, but the public dissemination feature of the law left open the possibility that the sanction may be excessive in relation to its legitimate nonpunitive effect. 884 F. Supp. at 1378-79. *Burton* noted that in none of the other cases litigating the constitutionality of sex offender registration acts were the public dissemination provisions, if any, as broad as in Alaska's law. 884 F. Supp. at 1380.

We note that the Alaska statute makes some information in a central registry confidential but allows for public disclosure under regulations to be adopted by the Department of Public Safety. 884 F. Supp. at 1376. KSORA's disclosure provision appears broader, as none of the required information is confidential.

Artway v. Attorney General of State of N.J., 81 F.3d 1235 (3d Cir.1996), as was *Burton*, was initiated by a motion for an emergency temporary injunction against enforcement of sex offender registration. The federal district court granted the motion in part, determining that the notification provision of New Jersey's Megan's Law was ex post facto legislation, although the registration provisions were upheld. The Third Circuit affirmed the federal district court as to the registration provisions but vacated the judgment as to the notification provisions, determining that the claims concerning those provisions were not ripe. 81 F.3d at 1242.

The New Jersey registration requirements are similar to those of other states, including Kansas. However, the New Jersey law provides for a procedure authorizing release of "relevant and necessary information concerning registrants when . . . necessary for public protection."

81 F.3d at 1243. The local county prosecutor takes the registration information, consults with the county prosecutor of conviction, and, using a non-exclusive list of statutory factors and Attorney General's Guidelines, makes a determination of the risk of reoffense for the registrant. A low risk offender is classified in Tier I, moderate risk in Tier II, and high risk in Tier III. Each tier requires different levels of notification. *For Tier I, only law enforcement agencies likely to encounter the offender are notified.* For Tier II, local schools, licensed day care centers and summer camps, and other community agencies and organizations involved in the care or supervision of children or support of battered women and rape victims are notified. For Tier III, members of the public likely to encounter the registrant are notified. Notification under Tiers II and III includes the registrant's name, photograph, physical description, the offense, address, place of employment or schooling, and a description and license plate number of the registrant's vehicle. The notification is also accompanied with a warning as to consequences of and criminal sanctions for acts of vandalism, threats, and assaults against a registrant. *Tier II notice recipients are also informed that the information is not to be shared with the public and is to be used only to assist in protecting children, battered women, or rape victims under their care.* The Tier I registration provisions of Megan's Law upheld in *Artway* limited disclosure to law enforcement agencies. The information is not open to the public. 81 F.3d at 1264. As previously mentioned, the Third Circuit in *Artway* did not address the constitutional claims concerning Tier II and III classifications and community notification.

Tier I registration is similar to the Kansas registration provision existing before KSORA. See K.S.A.1993 Supp. 22-4909 (no public disclosure). Under K.S.A. 22-4907, the information a sex offender is required to provide upon registration is not as extensive as that required under the New Jersey law. However, K.S.A. 22-4907 was recently amended to significantly expand the list of required information. L. 1996, ch. 224, § 5.

W.P. v. Poritz, No. CIV. A. 96-97, 1996 WL 374036 (D.N.J. July 1, 1996), upheld the constitutionality of the notification provisions in Megan's Law after applying the considerations previously discussed.

In *Doe v. Pataki*, 919 F. Supp. 691 (S.D.N.Y. 1996), the federal district court granted the class-action plaintiffs' motion for preliminary judgment against retroactive application of the notification provisions of New York's version of Megan's Law (modeled after New Jersey's law), but denied the motion as to the registration provisions. In determining that the public notification provisions were punitive, the court relied upon five of the *Mendoza-Martinez* factors, finding that the public notification provisions: (1) have traditionally been viewed as punitive; (2) serve a traditional punishment goal – deterrence; (3) impose an affirmative disability or restraint; (4) are triggered by behavior that is already a crime; and (5) have already led to excessively harsh results. 919 F. Supp. at 700-01.

Ex Post Facto Analysis of KSORA

We acknowledge the statements in *Artway*, 81 F.3d at 1262, and *John Doe*, 142 N.J. at 72-73, that the *Mendoza-*

Martinez factors are not the test for resolution of the ex post facto issue. However, we also recognize that those factors have provided guidance to a number of state (*e.g.*, *Ward, Noble*) and federal courts (*W.P., Pataki,* and *Burton*) in considering ex post facto challenges to sex offender registration legislation.

Because *Ursery* referenced the *Mendoza-Martinez* factors in its double jeopardy analysis, we believe those factors, to the extent they may be helpful, merit consideration in evaluating Myers' ex post facto claim. We do not apply the factors as a pass/fail test or in a checklist fashion. We believe that some add little, if anything, to the analysis, while others provide significant guidance. Discussed below are those factors that we believe should be emphasized in determining whether KSORA has a punitive effect sufficient to override its nonpunitive legislative purpose.

Affirmative Disability or Restraint

The KSORA registration requirement imposes no affirmative disability or restraint, because the offender's movements within or without the community are not restricted. The act of registration is the only requirement. Although there may be discomfort in registration, Myers, who carries the burden under his claim that KSORA is unconstitutional, has furnished no evidence of punishment flowing from registration alone. We hold that KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends. However, we must also consider the provision in K.S.A. 22-4909 that the registered information is open to

public inspection in the sheriff's office. Although 22-4909 does not impose any affirmative dissemination requirements on the authorities, it imposes no restrictions on anyone who inspects the information. The information could be routinely published in the newspaper or otherwise voluntarily disseminated by anyone. The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment. We find that the KSORA public disclosure provision does impose an affirmative disability or restraint. Unrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism.

Retribution and Deterrence

Registration has an obvious deterrent effect. A registered offender is more likely to think twice before committing another sex offense when the person knows that the local sheriff already has the offender's name on a list. We acknowledge the statement in *Ursery*, 116 S. Ct. 2149, that "the purpose of deterrence . . . may serve civil as well as criminal goals." The stigma that will accompany public exposure of the registered information could be viewed as a form of retribution. We find that the KSORA public disclosure provision may have both a deterrent and retributive effect. However, the nonpunitive purpose of the statute cannot be accomplished without informing the public that a sex offender is in its midst. If the statute limited public disclosure to that necessary to protect the public, then its deterrent effect could be viewed as incidental to its nonpunitive purpose. Unlimited public

access to the registry provides a deterrent or retributive effect that goes beyond such purpose.

Excessiveness

This is the key factor in our analysis. In other jurisdictions, for the sex offender registration laws found to be unconstitutional as ex post facto laws, the focus has been on the excessive scope of public disclosure of registered information. See, *e.g.*, *Pataki*, 919 F. Supp. at 700-01; *Burton*, 884 F. Supp. at 1376.

KSORA places no restrictions on who is given access to the registered offender information or what that person does with the information. The print or broadcast media could make it a practice of publishing the list as often as they chose. Anyone could distribute leaflets containing the registered information anywhere and anytime. We observe that under K.S.A. 21-4006, it is a misdemeanor to maliciously expose a paroled or discharged person as having been charged with or convicted of a felony with the intent to interfere with such person's employment or business. K.S.A. 21-4006 does not apply "to any person or organization who furnishes information about a person to another person or organization requesting the same." However, the crime of "maliciously exposing a paroled or discharged person" does not address exposure of sex offender registration for any other purpose, such as interference with a sex offender's housing situation. The unrestricted public access leaves open the probability that a registered sex offender could

suffer the kind of public stigma and ostracism that concerned the *Artway* court, although KSORA does not provide for any affirmative notification.

> "In particular, Artway argues that Megan's Law is analogous to that most famous badge of punishment: the Scarlet Letter. 'There can be no outrage . . . against our common nature, – whatever be the delinquencies of the individual, – no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do.' Nathaniel Hawthorne, *The Scarlet Letter* 63-64 (Random House 1950) (1850). Like the Scarlet Letter, Artway contends, Megan's Law results in public ostracism and opprobrium: it would subject him to potential vigilantism, impair his opportunities to work, and damage his abilities to develop and maintain stable relationships. In his submission, its 'remedial' purpose – to protect the public from him – seeks to brand him as an outcast. Such a shunning by one's community is the essence of historical punishment, Artway contends.
>
> "*Artway's argument has considerable force, but the notification issue is not before us.* We evaluate only registration, and that provision bears little resemblance to the Scarlet Letter. Registration simply requires Artway to provide a package of information to local law enforcement; registration does not involve public notification. *Without this public element, Artway's analogy fails. The Scarlet Letter and other punishments of 'shame' and 'ignominy' rely on the disgrace of an individual before his community.* The act of registering with a discrete government entity, which is not authorized to release that information to the

> community at large (except in emergencies), cannot be compared to public humiliation." 81 F.3d at 1265. (Emphasis added.)

We have acknowledged that merely having a criminal conviction in itself includes "not only the formal penalties and restrictions imposed by law but also collateral sanctions incidentally imposed by society." *State v. Miller*, 214 Kan. 538, 542, 520 P.2d 1248 (1974) (statute authorizing annulment of conviction on application of defendant held constitutional). In *Miller*, we observed:

> " '[T]he record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities. . . . ' " 214 Kan. at 542 (citing *United States v. Morgan*, 346 U.S. 502, 519, 98 L. Ed. 248, 74 S. Ct. 247 [1954]).

The Court of Appeals relied on *Miller* in holding that a statute that retrospectively eliminated a right to have a prior conviction expunged altered the punishment in violation of the Ex Post Facto Clause. *State v. Anderson*, 12 Kan. App. 2d 342, 344-45, 744 P.2d 143 (1987).

"Sexually violent crime" is defined in KSORA as including the following sex-related felony crimes: rape, indecent liberties with a child, aggravated indecent liberties with a child, criminal sodomy, aggravated criminal sodomy, indecent solicitation of a child, aggravated indecent solicitation of a child, sexual exploitation of a child, aggravated sexual battery, a felony conviction under a

prior law comparable to any of above crimes, a federal or other state felony conviction that would be a sexually violent crime in this state, an attempt, conspiracy or criminal solicitation of any of the above crimes, and "any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated." K.S.A. 22-4902(b). Although all of the other categories are limited to felonies, the last category could apparently include any "sexually motivated" act resulting in an "offense."

Several of the listed felonies include what otherwise might be viewed as voluntary sexual contact between two persons that is considered criminal because of the minority status of the victim and the fact that the victim is not married to the accused: indecent liberties with a child, K.S.A. 21-3503(a) (lewd touching or fondling or solicitation of same with a 14-15 year old); aggravated indecent liberties with a child, K.S.A. 21-3504(a)(1) (sexual intercourse with a 14-15 year old); criminal sodomy, K.S.A. 21-3505(a)(2) (sodomy with a 14-15 year old); indecent solicitation of a child, K.S.A. 21-3510(a) (soliciting a 14-15 year old to commit an unlawful sexual act, or persuading such person to enter a vehicle or building for such purpose). As an example, does every 18 year old (or 16 or 17 year old prosecuted as an adult) who has a voluntary sexual relationship with a 15 year old, is convicted of one of the above crimes, and is registered as a "sex offender" pose a sufficient risk of reoffense that the registered information should be subject to unrestricted public access?

K.S.A. 22-4908 does provide a mechanism whereby an already registered sex offender may petition the court

for relief from the duty to continue registering. However, this does not address the concern of whether it is initially appropriate for the public to have access to the offender's registered information. KSORA does not allow for any such individualized determination.

Whether we apply the New Jersey Supreme Court's approach in *John Doe*, the three-prong analysis in *Artway*, the considerations listed in *W.P.*, or the *Mendoza-Martinez* factors, we reach the same conclusion: For Myers, KSORA's disclosure provision must be considered punishment. We hold that the legislative aim in the disclosure provision was not to punish and that retribution was not an intended purpose. However, we reason that the repercussions, despite how they may be justified, are great enough under the facts of this case to be considered punishment. The unrestricted public access given to the sex offender registry is excessive and goes beyond that necessary to promote public safety.

Because KSORA's disclosure provision makes more burdensome the punishment for a crime after its commission, we conclude K.S.A. 22-4909, as applied to Myers, violates the constitutional prohibition against ex post facto laws.

We emphasize we are not balancing the rights of Myers or other sex offenders against the rights of his or their victims. What we are addressing is the right of every citizen, in this case, Myers, to test a claim of constitutional infringement arising from retroactive legislation. Regardless of legislative motivation, we have a duty to entertain such a claim when asserted and to resolve the tension between the positions of Myers and the State.

Public access to sex offender registration is a matter of legislative public policy. Although we defer to the legislature on policy matters, we must, however, exercise our duty of analysis when ex post facto claims impact legislative policy. Would-be sex offenders have been on notice since April 14, 1994, when KSORA became law, that if they commit certain crimes they will be subject to public disclosure under K.S.A. 22-4909. Myers, whose offense was committed before April 14, 1994, had no such notice. The significant date in an ex post facto analysis is the date of the offense, not the date of conviction. *Weaver v. Graham*, 450 U.S. 24, 30-31, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). To avoid the ex post facto characterization, public access should be limited to those with a need to know the information for public safety purposes. This information should be used by those given access to it only for such purposes. As the law is written now, no such measures are in place for Myers.

Cruel and Unusual Punishment – Due Process

Myers contends that the disclosure aspect of KSORA constitutes cruel and unusual punishment. The Eighth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment (see *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 [1962]), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Section 9 of the Kansas Constitution Bill of Rights prohibits infliction of cruel or unusual punishment. Myers also asserts that KSORA violates due process guarantees under the Fifth and Fourteenth Amendments to the United States Constitution.

As the State points out, Myers raises these two constitutional issues for the first time on appeal. When constitutional grounds are asserted for the first time on appeal, they are not properly before us for review. *State v. Kaesontae*, 260 Kan. 386, ___ P.2d ___ (1996); *State v. Steadman*, 253 Kan. 297, 306, 855 P.2d 919 (1993).

Myers concedes that his cruel and unusual punishment argument was not raised below, but asserts that it fits within the first two of the following exceptions to the general rule:

> "(1) Cases where the newly asserted theory involves only a question of law arising on proved or admitted facts and which is finally determinative of the case;
>
> (2) Questions raised for the first time on appeal if consideration of the same is necessary to serve the ends of justice or to prevent denial of fundamental rights; and
>
> (3) That a judgment of a trial court may be upheld on appeal even though that court may have relied on the wrong ground or assigned a wrong reason for its decision." *State v. Puckett*, 230 Kan. 596, 598-99, 640 P.2d 1198 (1982).

We do not agree. Our reversal based on the ex post facto application of KSORA's disclosure provision negates the substance of Myers' reliance on *Puckett*.

Myers also contends that KSORA violates due process under the Fifth and Fourteenth Amendments to the United States Constitution because the term "rehabilitation" is unconstitutionally vague. K.S.A. 22-4908 provides for a hearing in which the sex offender may petition the court for relief from further registration upon a showing

that offender is "rehabilitated." Myers' argument is in the abstract, because he has not petitioned for relief under 22-4908. His claim is unripe. See *Artway*, 81 F.3d at 1242. Myers' due process claim is not within the *Puckett* exceptions. We refuse to consider this issue for the first time on appeal. No fundamental rights have been denied Myers under K.S.A. 22-4908.

Conclusion

We uphold the constitutionality of the registration requirement in KSORA. K.S.A. 22-4904; K.S.A. 22-4906, and K.S.A. 22-4907. The disclosure provision allowing public access to sex offender registered information, K.S.A. 22-4909, when applied to Myers, is unconstitutional punishment under the Ex Post Facto Clause. The unlimited public accessibility to the registered information and the lack of any initial individualized determination of the appropriateness and scope of disclosure is excessive, giving the law a punitive effect – notwithstanding its purpose, shown in the legislative history, to protect the public.

We affirm the district court, subject to the unconstitutionality of the K.S.A. 22-4909 disclosure provision as applied to Myers.

To prevent an ex post facto violation, each sheriff's office shall adopt a record system that prevents public access or disclosure of the statements or any other information required by KSORA of any sex offender required to register whose offense occurred before April 14, 1994. Any such statements or other information shall neither be

open to the public nor subject to the provisions of the Kansas Open Records Act, K.S.A. 45-215 *et seq.*

Affirmed in part and reversed in part.

APPENDIX B

22.4901. Citation of act. K.S.A. 22-4901 through 22-4910, and amendments thereto, shall be known and may be cited as the sex offender registration act.

22-4902. Definitions. As used in this act, unless the context otherwise requires:

(a) "Sex offender" includes any person who, after the effective date of this act, is convicted of any sexually violent crime set forth in subsection (b) Upon such conviction, the court shall certify that the person is a sex offender and shall include this certification in the order of commitment. Convictions which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction. Any conviction set aside pursuant to laws is not a conviction for purposes of this section. A conviction from another state shall constitute a conviction for purposes of this section.

(b) "Sexually violent crime" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

(6) indecent solicitation of a child as defined by K.S.A. 21-3510 and amendments thereto;

(7) aggravated indecent solicitation of a child as defined by K.S.A. 21-3511 and amendments thereto;

(8) sexual exploitation of a child as defined by K.S.A. 21-3516 and amendments thereto;

(9) aggravated sexual battery as defined by K.S.A. 21-3518 and amendments thereto; or

(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent crime as defined in subparagraphs (1) through (9), or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent crime as defined in this section;

(11) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301a, 21-3302a or 21-3303a, and amendments thereto, of a sexually violent crime, as defined in this section; or

(12) any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated. As used in this subparagraph "sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(c) "Law enforcement agency having jurisdiction" means the sheriff of the county in which the offender expects to reside upon the offender's discharge, parole or release.

22-4903. Penalties. Any person who is required to register as provided in this act who violates any of the provisions of this act is guilty of a class A nonperson misdemeanor.

22-4904. Registration of offender. (a) Within 15 days of the sex offender coming into any county in which the sex offender resides or is temporarily domiciled for more than 15 days, the sex offender shall register with the sheriff of the county.

(b)(1) If any person required to register as provided in this act changes the address of their residence, the sex offender shall, within 10 days, inform in writing the law enforcement agency where last registered of the new address.

(2) The law enforcement agency shall, within three days of receipt of the new address, forward this information to the Kansas bureau of investigation and to the law enforcement agency having jurisdiction of the new place of residence.

22-4905. Offender released, staff's duty to inform; address obtained. (a)(1) Any sex offender, who is discharged or paroled from a prison, hospital or other institution or facility involving a violation of a sexually violent crime pursuant to K.S.A. 22-4902, and amendments thereto, prior to discharge, parole or release, shall be informed by the staff of the facility in which the sex offender was confined of the duty to register as provided in this act.

(2)(a) The staff of the facility shall explain the duty to register and the procedure for registration and require

the person to sign a form prepared by the Kansas bureau of investigation stating that the duty and procedure have been explained to the person.

(B) The staff of the facility shall obtain the address where the person expects to reside upon discharge, parole or release and shall report the address to the Kansas bureau of investigation.

(C) The staff of the facility shall give one copy of the form to the person and shall send two copies to the Kansas bureau of investigation, which shall then forward one copy to the law enforcement agency having jurisdiction where the person expects to reside upon discharge, parole or release.

(b)(1) Any sex offender who is released on probation, receives a suspended sentence, sentenced to community corrections or release on postrelease supervision because of the commission of one of the sexually violent crimes defined in K.S.A. 22-4902, and amendments thereto, prior to release, shall be informed of the offenders duty to register as provided in this act by the court in which the offender is convicted.

(2)(A) The court shall require the person to read and sign a form prepared by the Kansas bureau of investigation stating that the duty to register and the procedure for registration has been explained to such sex offender.

(B) The court shall obtain the address where the person expects to reside upon release and shall report the address to the Kansas bureau of investigation.

(C) The court shall give one copy of the form to the person and shall send two copies to the Kansas bureau of investigation which shall then forward one copy to the law enforcement agency having jurisdiction where the person expects to reside upon release.

22-4906. Time period in which required to register; liability. (a) Any person required to register as provided in this act shall be required to register: (1) Upon the first conviction of a sexually violent crime, if not confined, for a period of 10 years after conviction, or, if confined, for a period of 10 years after paroled, discharged or released; or (20) upon a second or subsequent conviction for such person's lifetime.

(b) Upon the first conviction, liability for registration terminates, if not confined, at the expiration of 10 years from the date of conviction, or, if confined, at the expiration of 10 years from the date of parole, discharge or release, if the convicted sex offender does not again become liable to register as provided by this act during that period.

22-4907. Information required in registration. (a) Registration as required by this act shall consist of a statement in writing signed by the person. The information shall include the following:

(1) Name;

(2) date of birth;

(3) offense or offenses committed, date of conviction or convictions obtained;

(4) city or county of conviction or convictions obtained;

(5) a photograph;

(6) fingerprints; and

(7) social security number.

(b) Within three days, the registering law enforcement agency shall forward the statement and any other required information to the Kansas bureau of investigation.

22-4908. Court order to relieve offender of duty to register. Any sex offender registered as provided in this act may apply to the court in this state having jurisdiction over the county in which the sex offender resides for an order relieving the sex offender of the duty of registration. The court shall hold a hearing on the application at which the applicant and any interested persons may present witnesses and other evidence. If, after the hearing, the court finds by a preponderance of the evidence that the sex offender is rehabilitated, the court shall grant an order relieving the offender of the duty of further registration under this act.

22.4909. Information subject to open records act. The statements or any other information required by this act shall be open to inspection in the sheriff's office by the public and specifically are subject to the provisions of the Kansas open records act. K.S.A. 45-215 *et seq.*, and amendments thereto.

22-4910. Effective date. K.S.A. 22-4901 through 22-4910 shall be effective on and after July 1, 1993.

APPENDIX C

[p. 42] Excerpt from Lyon County,
Kansas District Court Case
No. 90-CR-432, Transcript of Sentencing,
pp. 42-45, August 15, 1994.

* * *

MR. DAVIS: For the purpose, my understanding of criminal law is that this incident having occurred prior to the enactment [p. 43] of that law, I do know [sic] believe that the Supreme Court has, to this point allowed the retroactive application of laws such as this. I recognize that my client was convicted subsequent to the enactment of that law; however, the, the [sic] incident and the circumstances that lead to that conviction occurred prior to that law by several years, and it would be our position that the law would not be applicable given the state of the law as I understand the Supreme Court has applied it in criminal cases.

THE COURT: And what's your position for the State of Kansas?

MR. VAN PETTEN: Well, Judge, quite honestly I didn't consider that; however, I, I believe this would be a procedural matter not a substantive matter dealing with the charge and; therefore, retroactivity would apply and as a procedural matter it's applied to the case upon its enactment and I think it would apply in this situation.

THE COURT: I believe it would apply and we'll let probation people tend to that. What we are doing in Sedgwick County is that we have determined a form and a procedure and the [p. 44] probation people are taking care of that, is that what – do you know, Jeanne?

MS. TURNER: We have the form here but I think it's done through the sheriff's office.

THE COURT: But we will manage it through the probation people and make sure it's done. I will rule that it does apply. Now, is there anything we need to talk about to make the record a complete record?

MR. DAVIS: My understanding is that the Court file will reflect that my client's mother pledged certain assets for purpose of the bond, we would ask that that would be released.

THE COURT: The State wish [sic]to speak to that?

MR. VAN PETTEN: No, sir.

THE COURT: Okay. It's done.

MR. MYERS: Your Honor, can I say something?

THE COURT: Tell your lawyer.

MR. DAVIS: Your Honor, with regard to the, to the Court's ruling regarding my client comply with the statute and report his record in the community which he's residing, I would simply request that my objection to that order [p. 45] be reflected on the record.

THE COURT: It is so shown.

APPENDIX D

[p. 77] Journal Entry, Lyon County, Kansas
District Court Case No. 90-CR-432, R.II, pp. 77-78,
January 4, 1995

IN THE DISTRICT COURT
OF LYON COUNTY, KANSAS

THE STATE OF KANSAS,

Plaintiff,

vs. (Filed Feb. 10, 1995)

KYM MYERS,

Defendant.

NOW on this 4th day of January, 1995, the above captioned matter comes before the court on motion of the defendant to Modify The Conditions Of Probation herein and a motion to Terminate Probation. The State of Kansas appears by Edwin A. Van Petten, Special Assistant Attorney General and Jalynn Copp, Assistant Attorney General; the defendant appears in person and by Steven L. Davis, Court appointed counsel; there are no other appearances.

WHEREUPON, the Court first takes up defendant's motion to Terminate Probation. The Court hears statements and arguments of counsel regarding this matter, reviews the files and the records herein and finds that said motion should be overruled.

WHEREUPON, the Court considers defendant's motion to Modify the Terms of Probation to eliminate registration of defendant pursuant to K.S.A. 22-4901 *et. seq.* The Court reviews the brief submitted by defendant herein, hears the statements and arguments of counsel

regarding this matter, and hears statement presented by the defendant, and upon reviewing the file and the record herein finds that defendant's motion should be, and hereby is overruled.

IS IT THEREFORE, By the Court ORDERED, ADJUDGED, AND DECREED that defendants motion herein to Terminate Probation shall be overruled, and defendant's motion to Modify the Terms of Probations to eliminate reporting of this defendant pursuant to K.S.A. 22-4901 *et. seq.* shall be overruled.

IT IS SO ORDERED.

/s/ Paul W. Clark
Paul Clark
District Judge Assigned

SUBMITTED BY:

/s/ Edwin A. Van Petten
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